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In The

# Supreme Court of the United States

October Term, 1994

OHIO SAVINGS BANK, f/k/a
OHIO SAVINGS ASSOCIATION,

*Petitioner,*

vs.

FRANCES HAMILTON, et al.,

*Respondents.*

**Petition For Writ Of Certiorari
To The Supreme Court Of Ohio**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Do the plain language and congressional intent of the Truth-in-Lending Act preclude the application of equitable tolling doctrines that would allow obligors to file lawsuits nine or more years after the Act was allegedly violated?

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**Petition For Writ Of Certiorari**
**To The Supreme Court Of Ohio**

## PETITION FOR WRIT OF CERTIORARI

## INTRODUCTION

Hugh M. Stanley, Jr., counsel of record for Ohio Savings Bank, f/k/a Ohio Savings Association, petitions for writ of certiorari to review the judgment of the Ohio Supreme Court entered on August 31, 1994.

## OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 70 Ohio St. 3d 137, 637 N.E.2d 887 (1994), and is attached at Appendix ("App.") 1.

The opinion of the Eighth District Court of Appeals for Cuyahoga County, Ohio, was entered on September 28, 1992, and is attached hereto at App. 8.

The judgment entry of the trial court was entered on May 15, 1991 and is attached hereto at App. 24.

Additional proceedings include a prior appellate decision (App. 26) and two prior trial court entries (App. 47, 49).

## JURISDICTIONAL STATEMENT

The opinion of the Ohio Supreme Court was entered August 31, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

15 U.S.C. § 1640(e) provides that:

**Jurisdiction of courts; limitations on actions**

(e) Any action under this section may be brought in any United States district court, or any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense

> by recoupment or set-off in such action, except as otherwise provided by State law.

App. 51.

## STATEMENT OF THE CASE

This action was originally filed by Respondent Frances Hamilton ("Hamilton") on January 30, 1985 against Petitioner Ohio Savings Bank, f/k/a Ohio Savings Association ("Ohio Savings"). Respondents George and Barbara Seidel were added thereafter in an amended class action complaint.

The Amended Complaint alleged that loans issued to Hamilton and the Seidels (hereinafter collectively "Borrowers") in 1976 and 1977 would not amortize completely within their stated terms. Discovery disclosed that the loans' monthly payments, as set forth in the respective Notes, were understated by about $3 because Ohio Savings had calculated the monthly payment according to the "365/365" method for calculating interest instead of the "365/360" method specified in the mortgage Notes.[1] This understated monthly payment caused the amortization problem.

Out of this scenario, Borrowers alleged that Ohio Savings violated the Truth-in-Lending Act, 15 U.S.C.

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[1] Under the "365/360" method, interest is charged for 365 days based on a 360-day year of 12, 30-day months. Under the "365/365" method, interest is charged for 365 days based on a 365-day year. Utilizing the 365/360 method yields a slightly greater amount of interest each year.

§ 1601, *et seq.* ("TILA") by failing to disclose the effect of the 365/360 method on the Annual Percentage Rate ("APR"). They also alleged that Ohio Savings breached the terms of the loans by servicing them in accordance with the 365/360 terms of the loans, committed fraud, and was unjustly enriched.

Ohio Savings initially moved for partial summary judgment on Borrowers' time-barred TILA claims on August 19, 1985. Although the court granted that motion, the summary judgment did not become final until May 15, 1991, when the Court granted Ohio Savings' motion for summary judgment on all remaining claims. The final summary judgment rendered Borrowers' motion for class certification moot.

The Cuyahoga County Court of Appeals unanimously affirmed summary judgment on September 17, 1992. App. 8. The Court of Appeals held that the one-year statute of limitations for TILA claims set forth in 15 U.S.C. § 1640(e) was "subject to the doctrines of equitable tolling and fraudulent concealment." App. 18, *citing, Jones v. TransOhio Savings Ass'n*, 747 F.2d 1037, 1043 (6th Cir. 1984) (hereinafter "*Jones*"). The Court cited *King v. State of California*, 784 F.2d 910, 915 (9th Cir. 1986), *cert. denied and appeal dism'd*, 484 U.S. 802, 108 S.Ct. 47, 98 L.Ed.2d 11 (1987) (hereinafter "*King*"), for its standard that "the doctrine of equitable tolling may 'suspend the limitations period until the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosure that form the basis of the TILA action.' " *Id.* Upon reviewing the record, however, the Court of Appeals was "unable to find that the evidence herein created a genuine issue as to whether appellee concealed the violation of the Truth-in-

Lending Act or whether a violation occurred in a manner such that it concealed itself." *Id.* It therefore affirmed summary judgment on the TILA claims. It affirmed summary judgment on the common law claims on separate grounds.

The Ohio Supreme Court reversed on all counts. App. 1. Like the Court of Appeals, the Ohio Supreme Court adopted the approach set forth in *Jones* and *King*, holding that the TILA's statute of limitations may be tolled by fraudulent concealment. App. 5. The court did not, however, determine whether the appellate court had properly concluded that the record did not support a claim of fraudulent concealment. Instead, the Ohio Supreme Court remanded for further proceedings:

> [T]he time within which appellants are required to bring an action against the bank may be tolled until they discovered or had reasonable opportunity to discover the alleged fraud or nondisclosure that formed the basis for their Truth-in-Lending action. This determination necessarily involves questions of fact that preclude summary judgment. On remand, the trial court should determine when the appellants could reasonably have discovered the divergent terms of the mortgage, note, and disclosure forms, and whether they filed this action within one year of that date.

App. 6. The court further reversed summary judgment on the common law claims, finding that the record contained questions "best left to the finder of fact. . . . " *Id.*

## REASONS FOR ALLOWANCE OF WRIT

This appeal presents an issue of first impression for this Court: do equitable tolling doctrines apply to the one-year statute of limitations for Truth-in-Lending claims? Petitioner asks this Court to apply the analysis of *Lampf v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), to hold that the plain language and Congressional intent of the TILA preclude the application of tolling doctrines that would permit private enforcement actions to be filed nine years or longer after the occurrence of the alleged violation.

Two federal circuits and one state supreme court have held that fraudulent concealment may suspend the running of the one-year statute for years, even decades after the occurrence of the alleged Truth-in-Lending violation. Further, the Ohio Supreme Court has virtually obliterated the limitations period altogether by eliminating the requirement of "concealment" from the doctrine of fraudulent concealment. The decision below holds that the one-year period is tolled until borrowers "discover[] or ha[ve] reasonable opportunity to discover the alleged fraud or nondisclosure that formed the basis for their Truth-in-Lending action." App. 6.

The plain language and legislative history of the TILA demonstrate that tolling doctrines are both unnecessary and inconsistent with the scheme for speedy, uniform administrative enforcement of the TILA's disclosure requirements. Tolling is unnecessary because obligors actually harmed by nondisclosures may seek to take advantage of two statutory exceptions to the one-year

bar, seek restitution through an administrative enforcement proceeding after the one-year period has expired, *or* pursue common law claims for fraud, breach of contract, etc. (which Borrowers have asserted in this case).

Tolling doctrines are inconsistent with the TILA because the statute's drafters never intended a lender's potential liability for a private action to extend for years. Administrative action, not private lawsuits, is the key enforcement mechanism. Administrative enforcement is more suited to the complex calculations required to determine if a violation has occurred, and administrative enforcement can provide individual restitution *after* the one-year period for private actions has expired.

This Court should grant certiorari to correct the erroneous statutory construction that led the Ohio Supreme Court to conclude that the one-year period for private enforcement actions under the TILA is subject to equitable tolling.

## I. EQUITABLE DOCTRINES DO NOT TOLL A STATUTE OF LIMITATIONS FOR A RIGHT CREATED BY FEDERAL STATUTE WHEN TOLLING WOULD BE INCONSISTENT WITH THE PLAIN LANGUAGE AND CONGRESSIONAL INTENT OF THE STATUTE.

Statutes of limitations for federally created rights may be equitably tolled only when tolling is consistent with the plain language and legislative purpose of the statute. *Lampf v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991) (equitable tolling not applied to claim brought under Securities Exchange Act where it

was "unnecessary" and "inconsistent" with the plain language and legislative purpose of the statute); *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 557-58, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) (the proper test to be applied is "whether tolling the limitation in a given context is consonant with the legislative scheme").

In *Lampf*, this Court held that a statute of limitations with a parallel limitations structure – a one-year period that accrued after discovery of the underlying facts combined with a three-year statute of repose after which no action may be brought – demonstrated a Congressional intent inconsistent with tolling doctrines. In *Oropallo v. U.S.*, 994 F.2d 25 (1st Cir. 1993), the First Circuit applied the reasoning of *Lampf* to hold that equitable tolling would not apply to a statute which required suits for income tax refunds to be filed within three years after the filing of the return, and limited recovery to three years of refunds. By limiting damages to three years of refunds, *Oropallo* held, the statute evidenced a clear Congressional intent to make the three-year period for filing such lawsuits absolute.

Following the reasoning of *Lampf* and *Oropallo*, this Court should grant certiorari and hold that tolling doctrines are inconsistent with the plain language and Congressional intent of the TILA.

### A. Tolling Is Inconsistent with the TILA's Parallel Scheme for Civil Remedies.

Section 130(e) of the TILA, 15 U.S.C. § 1640(e) provides:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, *within one year from the date of the occurrence of the violation.* This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

App. 51 (emphasis supplied). The plain language of the first sentence of this section places a one-year limit on private enforcement actions. The second sentence implicitly recognizes that the time for bringing such actions may expire before the claim is known or knowable. Rather than provide for any type of tolling – express or implied – of the one-year period, Congress addressed the potential consequences of the one-year bar by allowing the alleged TILA violation to be raised as a matter of defense by recoupment or set-off at any time.

In other words, a lender that violates the TILA will not be permitted to benefit from the violation. Even though an obligor's independent cause of action expires after one year, the violation may still be raised as a defense of set-off or recoupment in any further action brought by the lender at any time. Equitable tolling is completely inconsistent with this parallel Congressional scheme of one year for independent actions asserting TILA violations and no time limit for defenses alleging such violations by way of recoupment or set-off.

Further evidence of a parallel scheme is the statute's linkage between the civil remedies available under § 1640

and the rescission remedy available under § 1635. After the one-year period for private enforcement actions has expired, the obligor may still seek relief in any rescission suit filed no later than the three years after the alleged violation. Specifically, 15 U.S.C. § 1635(f) establishes a three-year statute of repose for rescission actions:

> (f) An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor. . . .

Subsection (g) allows obligors who file a timely rescission suit to pursue a private action for nondisclosure that would otherwise be time-barred:

> In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

15 U.S.C. § 1635(g). This limited exception to the one-year bar of § 1640(e), contained within an explicit 3-year statute of repose, presents precisely the type of parallel structure this Court has held to be "fundamentally inconsistent" with equitable tolling. *Lampf*, 501 U.S. at 363.

Thus, the TILA permits private enforcement remedies to be pursued: 1) in a lawsuit filed within one year of the occurrence of the violation (§ 1640(e)); 2) in a rescission action filed no later than three years after the

transaction was consummated (§§ 1635(f), (g)); or 3) at any time as a matter of defense by recoupment or set-off (§ 1640(e)). This scheme for private enforcement actions is inconsistent with tolling provisions.

### B. Equitable Tolling Doctrines Are Unnecessary.

Tolling is also unnecessary, given the additional administrative and common or state law remedies available to obligors injured by a TILA violation. The agencies charged with enforcement of the TILA are empowered "to require the creditor to make an adjustment to the account of the person to whom credit was extended" pursuant to 15 U.S.C. § 1607(e)(1). More importantly, obligors may still pursue all available state law remedies for fraud, breach of contract, etc. *See* 15 U.S.C. § 1610(b) (the Act "does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State"); 15 U.S.C. § 1610(d) (the Act does not "affect the validity or enforceability of any contract or obligation under State or Federal law"). Thus, obligors who have actually been damaged by a nondisclosure may take advantage of longer state statutes of limitations and any available state tolling or discovery accrual doctrines that might apply to their claims.

The numerous safeguards available to obligors injured by violations of the TILA, and the strict limitations on private enforcement actions, preclude the application of equitable tolling doctrines to such suits. Further, as explained below, these safeguards are simply part of an overall Congressional scheme to enforce the disclosure

requirements of the TILA through administrative action, not private lawsuits.

## II. THE LEGISLATIVE HISTORY OF THE TRUTH-IN-LENDING ACT DEMONSTRATES CONGRESS' INTENT TO INTERPRET THE ONE-YEAR STATUTE OF LIMITATIONS FOR PRIVATE ACTIONS STRICTLY.

The Ohio Supreme Court noted that the statutory purpose of the TILA is " 'to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.' " App. 5, *quoting*, 15 U.S.C. § 1601(a). *See also, Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 364-65, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). Any analysis of the role of private enforcement, however, must go well beyond this basic declaration. In fact, the legislative history of the TILA and its amendments shows that the Act's drafters intended administrative agencies to be the primary enforcement vehicle for the Act's disclosure requirements. Administrative enforcement provides speedy, uniform action that best promotes consumers' informed use of credit. Lengthy, unwieldy private suits are poorly suited for the complexities of the TILA's disclosure requirements and do not promote more disclosure in a timely fashion. Allowing private lawsuits to be further delayed through the application of tolling doctrines is antithetical to the TILA's purpose and goals.

### A. The 1968 Act

The Consumer Credit Protection Act (popular name TILA), Pub. L. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. § 1601, *et seq.*), was first introduced as Senate Bill 5 in 1960. From its inception, the purpose of the bill was to ensure the *disclosure* of credit terms. State law was to remain the regulator of credit terms. As Senator Proxmire explained:

> Ever since former Senator Douglas introduced the bill in 1960, the basic thrust of truth in lending was disclosure. The bill was not a regulatory bill; it did not attempt to regulate interest or other practices. It did not attempt to alter or amend the pattern of legal rights and remedies afforded consumers and creditors under State law. The simple aim of the bill was to disclose to consumers the full cost of credit both in dollars and cents and in the terms of an annual percentage rate.

114 Cong. Rec. 14,487 (1968). The emphasis on disclosure, rather than altering behavior, argued against provisions which would make citizens "private attorney generals" of the bill. In fact, the bill had no provision for obligors to recover actual damages caused by any alleged violation of the disclosure requirements. Rather, obligors' sole remedy was limited to twice the finance charge (minimum $100, maximum $1,000), costs and attorneys fees. *See* 114 Cong. Rec. 14,489 (1968). Moreover, that remedy was only available in a private lawsuit brought within one year of the "occurrence" of the violation. *Id.*

This minor penalty provision was the only enforcement mechanism in Senate Bill 5, which passed the Senate

seven years after its introduction. When the bill came to the House, however, it was broadened and strengthened in several respects. The addition of a scheme for administrative enforcement was considered key to its acceptance by the House. As explained by Congresswoman Sullivan, Chair of the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency:

> On administrative enforcement of the disclosure requirements, the House provision prevails. The Senate had passed what was, in effect, a self-enforcement measure under which the aggrieved consumer would have had to file his own law suit in order to recover damages for not having been given the facts he was entitled to have. Our bill assigns enforcement responsibilities to existing governmental agencies, with the Federal Reserve having overall responsibility for issuing all regulations on the disclosure requirements.

114 Cong. Rec. 14,387 (1968).

The penalty provision was retained, but only as a secondary, minor enforcement tool. Explaining the advantages of administrative enforcement, Congressman Patman noted:

> Administrative enforcement provided in your committee's bill will insure uniform, broad, and effective application of the principle of disclosure. Administrative enforcement will not only afford necessary protection to the consumer, but will further protect the honest businessman from unethical forms of competition engaged in by some unscrupulous creditors who prey upon the poor through deceptive credit practices. Effective administrative enforcement

> will thus protect the honest merchant and insure that he is not penalized in the marketplace when he states the full cost of his credit in dollars and as a percentage rate.
>
> . . .
>
> *While provision is made in the bill for civil and criminal penalties, it is anticipated that the major enforcement activities will be carried out under the administrative enforcement provisions.*

114 Cong. Rec. 1427 (1968) (emphasis supplied). *See also,* H.R. No. 90-1040, § 4 (1968), U.S. Code Cong. & Admin. News 1968, p. 1975:

> Your committee believes that administrative enforcement of the credit disclosure features of the bill is fundamental to its legislative purpose.

It was administrative enforcement, then, not private enforcement, that assured adequate disclosure.

### B. Amendments

The TILA was amended in 1974 and 1980. The 1974 amendments constitute Title IV of Act of Oct. 28, 1974, Pub. L. 93-495, 88 Stat. 1500, U.S. Code Cong. & Admin. News 1974, pp. 1744 *et seq.* (hereinafter the "1974 Act"). The 1980 amendments appear in Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, 94 Stat. 132, U.S. Code Cong. & Admin. News 1980 (94 Stat.) 132 *et seq.* (hereinafter the "1980 Act"). These amendments, and their legislative history, further prove Congress' intent to leave all private enforcement actions not filed within one year of the occurrence of the alleged violation, asserted as a defense

by way of recoupment or set-off, or included as a part of a rescission action filed no later than three years after the consummation of the transaction, within the sphere of administrative enforcement or state law.

### 1. Amendments tied the filing of actions under Section 1640 to the three-year statute of repose in Section 1635.

The 1974 Act amended § 125 of the TILA (15 U.S.C. § 1635), to include a three-year statute of repose for any action by an obligor to rescind a credit transaction subject to the TILA. Specifically, the amendment provided that the three-day "cooling-off" period during which obligors may rescind their contract, "expires" three years after the transaction is consummated, whether or not the obligor receives notice of his or her right to rescind:

> (f) An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs earlier, notwithstanding the fact that the disclosures required under this section or any other material disclosures required under this chapter have not been delivered to the obligor.

§ 405, 88 Stat. at 1517. The 1980 Act further added subsection (g) to 15 U.S.C. § 1635, allowing obligors who file a timely rescission suit to also seek relief under § 1640. § 612, 94 Stat. at 176. Therefore, under these amendments, an obligor who fails to file a suit for nondisclosure within one year of the occurrence of the alleged violation may nevertheless pursue those claims pursuant to a lawsuit

for rescission filed within three years. The three-year period, however, is an absolute statute of repose.

The 1980 Act amended 15 U.S.C. § 1640(a)(3) to specify that an obligor may seek rescission in a civil action brought under § 1640. § 615, 94 Stat. at 180. This amendment, like the 1974 amendment of § 1635, again ties the remedies available under § 1640 to the three-year statute of repose in § 1635 and creates a "parallel" structure inconsistent with equitable tolling doctrines.

**2. Amendments strengthened administrative enforcement remedies and reinforced the one-year bar.**

The 1980 Act placed TILA enforcement virtually exclusively within the administrative realm. The Act amended § 108 of the TILA (15 U.S.C. § 1607), to grant administrative agencies the power to order restitution to obligors injured by a violation of the TILA. § 608, 94 Stat. at 171. Restitution may not be ordered, however, until *after* the one-year period for a private lawsuit has expired and the lender is *absolved* of any possible liability to the obligor. *See* S.R. No. 96-368, pp. 26-27 (1980), U.S. Code Cong. & Admin. News 1980, at p. 262:

> The committee would expect an agency, before ordering payment to the Treasury, to await expiration of the 1-year statute of limitations to assure that the creditor will not in the future be held liable to affected consumers for the payment of such sums.

Thus, the Congressional scheme permits obligors to sue within one year after the occurrence of the transaction,

without administrative interference. After one year, however, when "the creditor will not in the future be held liable," administrative action becomes the *exclusive* remedy. Congress' clear intent to shift enforcement responsibilities, and potential liability, from private parties to administrative agencies precludes the application of equitable tolling doctrines to extend private actions beyond one year.

The major purpose of the TILA is to obtain disclosure, not provide compensation to injured obligors. A suit brought nine years after the extension of credit does not assist in enforcing disclosure within a meaningful time. Administrative enforcement, not private enforcement, is the chosen mechanism of the Act and should not be defeated through the application of "equitable tolling" doctrines.

## III. A RULE WHICH PERMITS BORROWERS TO SUSPEND THE STATUTE OF LIMITATIONS UNTIL SUCH TIME AS THEY HAVE A "REASONABLE OPPORTUNITY" TO DISCOVER THE "NONDISCLOSURE" THAT FORMS THE BASIS OF THEIR CLAIM VIOLATES THE PLAIN LANGUAGE AND CONGRESSIONAL INTENT OF THE TILA.

The essence of the TILA is disclosure, and the defining act of violation is nondisclosure. Equitable doctrines that seek to toll statutes of limitation until the discovery of the "nondisclosure" effectively obliterate the statute of limitations.

In this case, the Ohio Supreme Court held that the one-year statute does not run so long as the borrower has not discovered, or had a reasonable opportunity to discover, "the alleged . . . nondisclosure that formed the basis for their Truth-in-Lending action." App. 6. Mere nondisclosure, the very act that is the basis of a violation, thus suffices to suspend the statute of limitations. Given the complexity of the formulas used to calculate the rate which must be disclosed, every borrower will claim he or she had no "reasonable opportunity" to discover the nondisclosure. The one-year bar is thereby rendered meaningless.

Many courts considering this anomaly have held that only fraudulent concealment will toll the one-year bar in § 1640(e), and that the concealment must be an affirmative act, more than mere nondisclosure. *See, e.g., Hughes v. Cardinal Fed. Sav. & Loan Ass'n*, 566 F. Supp. 834, 838 (S.D. Ohio 1983):

> The fraudulent concealment doctrine therefore requires more than mere nondisclosure. Otherwise, the one-year statute of limitations would be tolled in almost every Truth-in-Lending action in which a non-disclosure violation was found and the statutory limitations period would be a nullity. We conclude that Congress did not intend such result.

In *Hubbard v. Fidelity Fed. Bank*, 824 F. Supp. 909 (C.D. Cal. 1993), the district court recognized that mere complexity of mathematical calculations does not constitute the affirmative "concealment" necessary for tolling:

> Here, the Bank did not conceal the interest rate adjustment information from Hubbard. The

> Bank provided her with notices of the adjustments to her loan rate once a year which indicated the index value that was being used to modify the variable rate. For purposes of the statute of limitations, these notices provided Hubbard with a reasonable opportunity to discover what she alleges to be a non-disclosure. Hence, Hubbard's TILA claims are all barred by the statute of limitations.

*Id.* at 920. The Massachusetts Supreme Court reached the same result, construing its virtually identical state law:

> In the present circumstances discovery of the nondisclosures may have required merely the making of mathematical computations from known data or the receipt of information as to the governing legal requirements. To postpone the running of the statute of limitations until discovery of this sort occurs would be to eliminate any effective policy of repose. . . . We think that fraudulent concealment . . . must consist of more than the bare statutory violation giving rise to liability for the statutory penalty.

*Lynch v. Signal Finance Co. of Quincy*, 327 N.E.2d 732, 735 (Mass. 1975).

In this case, the mortgage Notes signed by Borrowers indicated that interest would be calculated according to the 365/360 method. When setting a monthly payment, however, Ohio Savings mistakenly used the 365/365 method, such that the monthly payments were about $3 too low to amortize the loan to zero within the stated terms of the loans. It was undisputed that this amortization problem could be determined by a mathematical calculation based on the data sent to the Borrowers every

month, and thus was discoverable within two months (at the latest) after the issuance of credit. This "mere non-disclosure" is insufficient to meet the "concealment" requirement for application of fraudulent concealment. Affirmative acts of concealment – not merely the complexity of available facts – must be shown to toll the statute.

Even if this Court should determine that fraudulent concealment can toll the one-year statute of limitations in 15 U.S.C. § 1640(e), it should grant certiorari to "disinter" the "concealment" requirement in the doctrine of fraudulent concealment. Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?* 71 Geo. L.J. 829 (1983). Without requiring an independent act of concealment – something more than mere silence – defendants lose their protection from a statute of limitations:

> In the absence of an independent concealment requirement, defendants are virtually powerless to assure themselves of the protections of limitations.
>
> . . .
>
> Thus, from a defendant's perspective, requiring proof of concealment serves an important function in ensuring that the period of limitations will apply. This concern is consistent with the origins of the tolling doctrine itself . . . proof of some wrongful conduct by the defendant beyond the commission of the substantive wrong was implicit in the court's willingness [in *Bailey v. Glover*, 88 U.S. 342 (1874)] to hold that the benefits of tolling outweighed the policies underlying limitations. Standing alone, the fact

> that the defendant has been accused of committing a wrong, however heinous, should not suffice to toll the statute of limitations.

*Id.* at 871, 872. These cautions are even more important in the context of TILA, where Congress has clearly expressed its intent that administrative enforcement, not private enforcement, is the primary vehicle for compliance.

## IV. CONCLUSION

The U.S. Supreme Court has never construed TILA's statute of limitations for private lawsuits. The Ohio Supreme Court has misinterpreted Congressional intent to permit a vague, unworkable tolling standard based on when an obligor discovers or has a reasonable opportunity to discover the fraud or nondisclosure that forms the basis for the Truth-in-Lending Claim. The plain language of the statute does not support such a doctrine. Moreover, the scheme of TILA favors administrative enforcement over private enforcement and maintains state law remedies for consumers damaged by nondisclosure. Contrary to the conclusion of the Ohio Supreme Court, the "informed use of credit" is *not* promoted by permitting the litigation of claims nine years after credit is extended.

Therefore, Petitioner respectfully requests this Court to grant certiorari and hold that, under the plain language and legislative history of the Truth-in-Lending Act,

no equitable tolling doctrines are implied in the one-year period for private actions alleging violations of the Act.

Respectfully submitted,

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## APPENDIX

HAMILTON ET AL., APPELLANTS, *v.* OHIO SAVINGS BANK, F.K.A. OHIO SAVINGS ASSOCIATION, APPELLEE.

[Cite as *Hamilton v. Ohio Savings Bank* (1994), 70 Ohio St.3d 137.]

*Banks – Residential mortgages – Bank's method of interest calculation results in incomplete amortization of mortgage within the stated term – Federal Truth in Lending Act violation alleged – Section 1640(e), Title 15, U.S.Code, construed and applied – Statute of limitations tolled until mortgagor discovered or had reasonable opportunity to discover the alleged fraud or nondisclosures that formed the basis for the Truth in Lending action.*

(No. 92-2302 – Submitted April 26, 1994 – Decided August 31, 1994.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 61908.

Plaintiffs-appellants, Frances E. Hamilton, Barbara A. Seidel and George L. Seidel, obtained residential mortgages from defendant-appellee, Ohio Savings Bank, formerly known as Ohio Savings Association ("Ohio Savings"). Hamilton's mortgage was for the principal sum of $44,000 and was to be payable in consecutive monthly installments of $364.79 with the "remaining balance, of principal and interest, if any," payable at the end of the twenty-nine-year mortgage term. The stated interest rate was 9.25 percent. The Seidel mortgage secured a principal amount of $32,400 with monthly payments of $262.76 over a period of twenty-nine years. Its stated interest rate was nine percent per annum. The Hamilton

mortgage was executed in September 1976 and the Seidel mortgage was signed in August 1977.

Both mortgages contained the following language regarding interest calculation:

"Such interest shall be computed monthly by (i) obtaining a daily interest factor based upon a 360-day year, (ii) multiplying such factor by the actual number of days in each calendar month, and (iii) applying the result against the unpaid balance of this note outstanding on the last day of each month."

"Regulation Z" consumer disclosure notices, pursuant to Section 226.1 *et seq.*, Title 12, C.F.R., were provided to both mortgagors. The record contains two different Hamilton Regulation Z forms. One is attached to the appellee's motion for summary judgment and is entitled "Joint Appendix Exhibit 'E' ". On this form a typewritten notation was included that stated "THE CONTRACT INTEREST RATE IS 9.25% (365/360 method)." The second Regulation Z form is attached as plaintiff's Exhibit 4 to the deposition of Judy Ledin. The same typewritten language is included but it would appear that the "365/360" language was altered to read "360/360." Given the state of these documents, it is difficult to ascertain exactly what was done. The Seidel Regulation Z form does not indicate how interest will be calculated.

Ultimately, another Ohio Savings mortgagor, John P. Clark, who holds degrees in both mathematics and economics, discovered that when the 365/360 method of interest calculation is used, the stated interest rate was less than that actually charged and paid to the bank.

Based on this theory, the appellants claim that the actual rate of interest on the Hamilton note became 9.37 percent rather than 9.25 percent, and on the Seidel note, 9.12 percent rather than nine percent. Additionally, because the bank had based the monthly payment on a 365/360 calculation, both notes carried monthly payments that were insufficient to fully amortize the principal over the term of the loan. According to appellants, this will result in outstanding balances at the end of the twenty-nine-year term on both notes, necessitating final payments of $6,493 of the Hamilton note and $4,702.34 on the Seidel note.

Hamilton and the Seidels filed suit on their own behalf and all others similarly situated, claiming violations of the federal Truth in Lending Act, Section 1601 *et seq.*, Title 15, U.S.Code, as well as common-law claims of fraud, unjust enrichment, conversion and breach of contract. After protracted litigation, appellee moved for summary judgment. The bank argued that the 365/360 method of interest calculation was legal and fully disclosed; the understated monthly payment was a mistake by the bank that actually inured to the benefit of appellants by understating their monthly payments by roughly $3 to $4; and the appellants' actions were time-barred. The trial court granted summary judgment for the bank and the court of appeals affirmed, holding, *inter alia*, that appellants' Truth in Lending claims were barred by the one-year statute of limitations found in Section 1640(e), Title 15, U.S.Code.

The matter is now before this court upon the allowance of a motion to certify the record.

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*Robert E. Sweeney Co., L.P.A. Robert E. Sweeney, Mark Wintering, Kevin E. McDermott* and *J. William Petro; Weiss, Kwait & Associates* and *Steven M. Weiss,* for appellants.

*Arter & Hadden, Hugh M. Stanley, Jr., Irene C. Keyse-Walker* and *Beth Whitmore; Marc W. Freimuth* and *Roy E. Lachman,* for appellee.

*Kristen E. Manos,* urging reversal for *amici curiae,* United States Public Interest Research Group, Ohio Public Interest Research Group, and Consumer Federation of America.

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MOYER, C.J. The threshold issue is whether appellants' claims are time-barred, thereby divesting the trial court of subject matter jurisdiction. Section 1640(e), Title 15, U.S.Code provides: "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. * * * "

The determinative question is what is meant by "occurrence of the violation." There is a divergence of views among the federal courts regarding the application of that phrase. At least three approaches have been used to determine when the statutory period commences. The first maintains that Congress clearly intended that the statute of limitations begins to run at the execution of the contract and should be strictly enforced. *Stevens v. Rock Springs Natl. Bank* (C.A.10, 1974), 497 F.2d 307. The second view is based on the notion that nondisclosure of the actual interest rates represents a continuing violation of

the contract and the limitations period should be fluid and liberally applied. See *Postow v. OBA Fed. S. & L. Assn.* (C.A.D.C.1980), 627 F.2d 1370 (adopting "continuing violation" theory in limited situations). The final theory is that offered by the Sixth Circuit in *Jones v. TransOhio Savings Assn.* (C.A.6, 1984), 747 F.2d 1037. The *Jones* court reasoned that to strictly enforce the one-year statute of limitations would run counter to the expressed purpose of the Act and its remedial nature. Therefore, the court held that under certain circumstances the statute might equitably be tolled. See, also, *King v. California* (C.A.9, 1986), 784 F.2d 910 (expressly adopting the Sixth Circuit's reasoning).

We adopt the third application of the statute because under the appropriate circumstances, tolling the statue of limitations will effectuate the purpose of Congress in adopting the Truth in Lending Act. Section 1601(a), Title 15, U.S.Code provides: " * * * It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."

The Act was designed as a consumer protection statute aimed at permitting informed choices and guarding against divergent and possibly fraudulent practices. *King, supra,* 784 F.2d at 915. Its provisions are remedial in nature and should be liberally construed. *Jones, supra,* 747 F.2d at 1040. As stated by the Sixth Circuit: " * * * Only if Congress clearly manifests its intent to limit the federal court's jurisdiction will it be precluded from addressing

allegations of fraudulent concealment which by their very nature, and if true, serve to make compliance with the limitations period imposed by Congress an impossibility." *Id.* at 1041.

Therefore, we conclude that in the case before us, the statute of limitations began to run at the time the mortgages were executed. However, the time within which appellants are required to bring an action against the bank may be tolled until they discovered or had reasonable opportunity to discover the alleged fraud or nondisclosures that formed the basis for their Truth in Lending action. This determination necessarily involves questions of fact that preclude summary judgment. On remand, the trial court should determine when the appellants could reasonably have discovered the divergent terms of the mortgage, note and disclosure forms, and whether they filed this action within one year from that date.

As to appellants' common-law claims, we are likewise persuaded that summary judgment was inappropriate. The record is contradictory as to what was disclosed to whom. On one document, the 365/360 method is disclosed; on another it is not. Summary judgment may not be granted when reasonable minds could come to differing conclusions. Civ.R. 56(C). Whether the method of interest calculation and the incomplete amortization of the loan within the stated term were disclosed is a question of fact. Whether these items amounted to misrepresentations, fraudulent conduct, or merely harmless mistakes, is also an issue best left to the finder of fact, thereby precluding summary judgment.

For the foregoing reasons, the judgment of the court of appeals is reversed, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

*Judgment reversed*
*and cause remanded.*

A.W. SWEENEY, DOUGLAS, WRIGHT, RESNICK, WOLFF and PFEIFER, JJ., concur.

WILLIAM H. WOLFF, JR., J., of the Second Appellate District, sitting for F.E. SWEENEY, J.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 61908

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| FRANCES HAMILTON, ET.AL.<br>PLAINTIFFS-APPELLANTS | : | JOURNAL ENTRY |
| v. | : | AND |
| OHIO SAVINGS BANK<br>DEFENDANT-APPELLEE | : | OPINION |

DATE OF ANNOUNCEMENT OF DECISION: SEPTEMBER 17, 1992

CHARACTER OF PROCEEDING: CIVIL APPEAL FROM THE COMMON PLEAS COURT CASE NO. CV-086378

JUDGMENT: AFFIRMED.
DATE OF JOURNALIZATION: SEP. 28, 1992

APPEARANCES:

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SPELLACY, J.:

On January 30, 1985, plaintiff-appellant Frances Hamilton ("appellant-Hamilton") filed a class action complaint against defendant-appellee-The Ohio Savings Association ("appellee"). Appellant-Hamilton initially alleged that appellee violated the Truth-In-Lending Act set forth in 15 U.S.C. Section 1601, et seq. Appellant-Hamilton claimed that appellee failed "to disclose that it was calculating interest on its mortgage notes in such a way as to result in a balloon payment or overcharge at the retirement or discharge" of the loan.

Appellant-Hamilton also alleged in his class action suit the causes of action for breach of contract, fraud, and unjust enrichment. Appellant-Hamilton sought compensatory and punitive damages, declaratory judgment and injunctive relief.

On April 26, 1985, an amended complaint was filed in the trial court. The amended complaint added appellants-George L. Seidel and Barbara A. Seidel ("appellants-Seidels") as plaintiffs to the class action suit. The amended complaint re-alleged the original claims for a violation of the Truth-In-Lending Act, breach of contract, fraud and unjust enrichment.

On June 1, 1985, appellee filed its first answer in response to appellants' class action complaint. Appellee basically denied the allegations presented by appellants and further raised several affirmative defenses.

On August 19, 1985, appellee filed a motion for partial summary judgment with regard to appellants' claim for a violation of the Truth-In-Lending Act. Appellee

argued that appellants' Truth-In-Lending Act claims were barred by the one-year statute of limitations set forth in 15 U.S.C. Section 1640(e).

On October 16, 1985, appellants filed a motion for a temporary restraining order and a motion for preliminary injunction. Appellants sought to enjoin appellee from enforcing the terms of any promises or commitments made by potential class members and from increasing the monthly payments or extending the term of the mortgages.

On January 29, 1986, the trial court denied appellants' motion for temporary restraining order and preliminary injunction. The trial court found that it appeared that appellants would not suffer irreparable harm.

On March 3, 1986 appellants filed a reply brief to appellees' motion for partial summary judgment. Appellants argued that the equitable tolling principles applied to the statute of limitations set forth in 15 U.S.C. Section 1640(e), thus, their claims under the Truth-In-Lending Act were not time-barred.

On June 28, 1988, the trial court granted appellants leave to file a second amended complaint. Once again, appellants alleged that appellee violated the Truth-In-Lending Act, breach of contract, fraud and unjust enrichment. Appellants further added, in their second amended complaint, the claims of conversion, estoppel and detrimental reliance, and waiver by appellee.

On July 22, 1988, appellee filed its first answer to the second amended complaint, with a counterclaim for reformation. In its counterclaim, appellee claimed that

appellants-Seidels' mortgage note mistakenly included an insufficient monthly payment that would fully amortize the loan. Appellee requested that as a result of the alleged mutual mistake, the trial court should increase the monthly payments owed by appellants-Seidels.

Also, on July 22, 1988, appellee filed its second motion for partial summary judgment. Appellee reiterated its contention that appellants' Truth-In-Lending Act claims were barred by the one-year statute of limitations under 15 U.S.C. Section 1640(e).

Appellee further argued in its motion for partial summary judgment that appellants-Seidels were precluded from bringing their claims for violations of the Truth-In-Lending Act. Appellee asserted that appellants-Seidels' loan was not a consumer loan within the provisions of the Truth-In-Lending Act.

Finally, appellee contended that there existed no genuine issue of material fact as to appellants' claim for breach of contract. Appellee claimed that the plain and unambiguous language of the parties' contracts stated that they owed interest at the stated rate calculated according to the "365/360 methodology.[1]"

On August 31, 1988, appellee filed an amended answer and counterclaim. Appellee added to its counterclaim a claim for breach of contract.

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[1] The "365/360" method" of calculating interest determines the interest on a 360-day year. For a loan held for a full year, the daily interest factor will be applied for 365 days.

On September 23, 1988, appellants filed a motion to dismiss appellee's counterclaim for breach of contract. Appellants contended that appellee's counterclaim for breach of contract was merely an attempt to create a new cause of action as a substitute for its counterclaim for reformation, which was time-barred.

On October 13, 1988, the trial court issued a journal entry stating that appellants' "motion to dismiss for failure to state a claim upon which relief can be granted is granted." This order dismissed appellee's counterclaim for reformation.[2]

On November 18, 1988, the trial court granted appellee's motion for partial summary judgment "on the ground that the one-year statute of limitations set forth in 15 U.S.C. Section 1640(e) applies to the within action." However, the trial court denied appellee's second motion for summary judgment "as to the allegation that Plaintiffs George and Barbara Seidel's claims do not fall within the purview of 15 U.S.C. Section 1600, et seq."

In the same journal entry, the trial court further ordered that the remainder of appellants' complaint and/or any counterclaims were dismissed without prejudice.

Appellants filed a timely notice of appeal to this court. Appellee also filed a timely notice of appeal as cross-appellant.

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[2] Appellants sought to dismiss appellee's counterclaim for reformation for failure to state a claim upon which relief can be granted. Whereas, appellants' motion to dismiss appellee's counterclaim for contract was based on the contention that appellees raised an inappropriate remedy.

Appellants challenged the trial court's granting of partial summary judgment in favor of appellee on their claims for a violation of the Truth-In-Lending Act. Appellants further challenged the trial court's *sua sponte* dismissal of their claims for breach of contract, fraud, unjust enrichment, conversion, estoppel and waiver.

In its appeal, appellee argued that the trial court erred in granting appellants' motion to dismiss its counterclaim for reformation. Appellee also challenged the trial court's *sua sponte* dismissal of appellants' common law causes of action and its counterclaim for breach of contract.[3]

On April 24, 1990, this court issued an opinion reversing in part, dismissing in part and remanding the case. This court initially found that the trial court did not possess the legal authority to *sua sponte* dismiss appellants' common law claims and appellee's counterclaim for breach of contract.

This court then went on to hold that the existence of appellants' common law claims and appellee's counterclaim for breach of contract made the trial court's disposition of partial summary judgment and its dismissal of appellee's counterclaim for reformation non-appealable. Therefore, the appeal was dismissed as to the granting of appellee's motion for partial summary judgment and the dismissal of appellee's counterclaim for reformation.

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[3] Appellee argued that appellants' common law causes of action should have been dismissed "with prejudice."

Both appellee and appellants appealed to the Ohio Supreme Court. However, the Ohio Supreme Court overruled their motions for certification.

Upon remand, appellee filed a motion for summary judgment on January 30, 1991 regarding appellants' remaining common law causes of action. Appellee argued that it fulfilled its promises as set forth in the mortgage notes. Appellee further argued that the "365/360 method" for interest calculation was not improper and, to the contrary, had been recognized in Ohio for over 100 years. Finally, appellee asserted that the mortgage notes clearly and unambiguously stated that interest was to be paid at a stated rate calculated by the "365/360 method."

On March 6, 1991, appellants filed their brief in opposition to appellee's motion for summary judgment. Appellants basically argued that there was ample evidence submitted to create a genuine issue of material fact as to each of their theories of relief.

On May 15, 1991, the trial court granted appellee's motion for summary judgment. In its journal entry, the trial court further found that it did not have to address the issue of class certification since its order was a final appealable order.[4]

Appellant filed a timely notice of appeal and subsequently raised the following assignments of error.

I. THE TRIAL COURT ERRED IN RULING THAT APPELLANTS' TRUTH-IN-LENDING CLAIMS ARE TIME-BARRED SINCE

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[4] Appellee voluntarily dismissed its counterclaim for breach of contract on June 25, 1991.

GENUINE MATERIAL ISSUES EXIST AS TO THE APPLICABILITY OF EQUITABLE TOLLING PRINCIPLES.

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' BREACH OF CONTRACT CLAIMS SINCE: (i) THE APPELLEE IS CHARGING INTEREST AT RATES WHICH EXCEED THE AGREED, NUMERICALLY STATED RATES ; AND, (ii) THE APPELLEE BREACHED ITS AGREEMENT TO PERMIT REPAYMENT OF THE APPELLANTS' LOANS IN CONSECUTIVE, MONTHLY PAYMENTS THAT ARE EQUAL IN AMOUNT; AND, (iii) THE RULES OF CONTRACT INTERPRETATION REQUIRE THAT THE APPELLEE CHARGE INTEREST ONLY AT THE AGREED, NUMERICALLY STATED RATES.

III. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' FRAUD CLAIMS SINCE THE APPELLANTS DETRIMENTALLY RELIED UPON: (i) THE APPELLEE'S FALSE REPRESENTATION THAT IT WOULD CHARGE INTEREST AT THE RATES SET FORTH IN THE PROMISSORY NOTES AND DISCLOSURE DOCUMENTS; AND (ii) THE APPELLEE'S FALSE REPRESENTATION THAT INTEREST COULD BE REPAID WITH EQUAL MONTHLY INSTALLMENTS OF PRINCIPAL AND INTEREST.

IV. THE TRIAL COURT ERRED IN DISMISSING THE APPELLANTS' CLAIM FOR A DECLARATION THAT THE APPELLEE WAIVED ITS RIGHT TO CHARGE INTEREST IN EXCESS OF THE AGREED,

NUMERICALLY STATED RATES WHERE THE APPELLEE HAS CONTINUOUSLY ACCEPTED EQUAL MONTHLY PAYMENTS ON PRINCIPAL AND INTEREST WHICH WERE CALCULATED ACCORDING TO THE AGREED RATES.

V. THE TRIAL COURT ERRED IN DISMISSING THE APPELLANTS' CLAIM FOR A DECLARATION THAT THE APPELLEE SHOULD BE ESTOPPED FROM ASSERTING A RIGHT TO CHARGE INTEREST IN EXCESS OF THE AGREED, NUMERICALLY STATED RATES WHERE THE APPELLEE HAS CONTINUOUSLY ACCEPTED EQUAL MONTHLY PAYMENTS OF PRINCIPAL AND INTEREST WHICH WERE CALCULATED ACCORDING TO THE AGREED RATES.

VI. THE TRIAL COURT ERRED IN DISMISSING THE APPELLANTS' CONVERSION AND UNJUST ENRICHMENT CLAIMS WHERE THE APPELLEE IS CHARGING INTEREST AT RATES WHICH EXCEED THE RATES SET FORTH IN THE PROMISSORY NOTES AND DISCLOSED IN ALL THE LOAN DOCUMENTS.

VII. THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANTS' REQUEST FOR AN ORDER TO RESTRAIN THE APPELLEE FROM MAILING RELEASE FORMS TO ALL EFFECTED BORROWERS WHERE SUCH RELEASE FORMS NEITHER EXPLAINED THAT A CLASS ACTION SUIT WAS PENDING NOR ADVISED THE BORROWERS OF THE TRUE FACTS

WHICH PROMPTED THE APPELLEE TO PROFFER THE RELEASE FORMS.

Appellee raises the following cross-assignments of error:

A. THE SPECIFIC 15-YEAR STATUTE OF LIMITATIONS CONTROLS OVER THE "CATCH-ALL" 10-YEAR STATUTE BECAUSE A WRITTEN CONTRACT FORMS THE BASIS FOR OHIO SAVINGS' COUNTERCLAIM.

B. EVEN IF APPLICABLE, THE 10-YEAR STATUTE DOES NOT BAR THIS ACTION.

In their first assignment of error, appellants argue that in granting appellee's motion for summary judgment, the trial court erred in ruling that their Truth-In-Lending claims were barred by the one-year limitation provision set forth in 15 U.S.C. Section 1640(e). Appellants contend that the time period was equitably tolled, since appellee concealed its violations of the Truth-In-Lending Act. Specifically, appellants assert that appellee obscured the real interest charges.

Pursuant to Civ. R. 56(C), a trial court may grant a motion for summary judgment only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion for summary judgment, the inferences from the underlying facts are construed in the light most favorable to the nonmoving party. Civ. R. 56(C); *Wills v. Frank Hoover Supply (1986), 26 Ohio St. 3d 186, 188.*

With regard to the Truth-In-Lending Act, 15 U.S.C. Section 1640(e) provides that "any action under this section may be brought within one year from the date of the occurrence of the violation." The statutory period commences when the contract is executed, subject to the doctrines of equitable tolling and fraudulent concealment. *Jones v. TransOhio Savings Ass'n* (1984) 747 F.2d 1037, 1043.

The limitations period set forth in 15 U.S.C. Section 1640(e) commences on the date of consummation of the transaction, but the doctrine of equitable tolling may "suspend the limitations period until the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the basis of the TILA action." *King v. State of California* (1986), 784 F.2d 910, 915.

15 U.S.C. Section 1640(e) shall be tolled where there is evidence that the wrongdoer was involved in concealing the fraud or where the wrongdoer committed a wrong in a manner that concealed itself. *Jones, supra.*

Upon a careful review of the evidence submitted by all parties, we find that no genuine issue of material fact exists as to the application of the one-year statute of limitations set forth in 15 U.S.C. Section 1640(e). We are unable to find that the evidence herein created a genuine issue as to whether appellee concealed a violation of the Truth-In-Lending Act or whether a violation occurred in a manner such that it concealed itself.

Appellant-Hamilton signed her loan with appellee on September 25, 1976 and appellants-Seidels signed their loan on August 9, 1977. The language set forth in the parties' respective mortgage notes clearly informed the

parties that the method for calculating interest would be the "365/360" method. We determine that appellee did not conceal the "365/360" method for calculating interest.

Moreover, appellant-Hamilton's Truth-In-Lending Disclosure Statement clearly disclosed that the interest rate was 9.25%, calculated with the "365/360" method. Appellants-Seidels' Disclosure Statement indicated that their contract interest rate was 9.0% and their annual percentage rate was 9.25%.

Finally, the evidence established that the respective parties received monthly statements which reflected the use of the "365/360" method in calculating interest. There was no evidence of concealment on the part of appellee nor fraudulent conduct.

Accordingly, we find that the running of the statute of limitations set forth in 15 U.S.C. Section 1640(e) was not equitably tolled. Thus, we conclude that appellants' Truth-In-Lending claims were time barred.

Appellants' first assignment of error is without merit and is overruled.

Appellants argue in their second assignment of error that the trial court erred in granting summary judgment in favor of appellee on their claim for breach of contract. Appellants contend that there exist genuine issues of material fact as to whether appellee breached the contracts by creating balloon payments and by calculating interest at rates which exceeded the contract or disclosed rates.

Construction of a written contract is generally a matter of law to be determined by the courts. *Alexander v.*

*Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. Where a contract is clear and unambiguous, its interpretation may properly be subject to summary judgment; if its terms cannot be determined from the four corners of the contract, however, interpretation should be left to the trier of facts. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322.

In the instant case, appellants executed mortgage notes with appellee. In both mortgage notes, it explicitly read in relevant part as follows:

> Such interest shall be computed monthly by (i) obtaining a daily interest factor based upon a 360-day year, (ii) multiplying such factor by the actual number of days in each calendar month, and (iii) applying the result against the unpaid balance of this note outstanding on the last day of each month.

The language contained in the parties' respective mortgage notes clearly described the "365/360" method of calculating interest. Thus, we conclude that it was the intent of the parties that interest would be calculated pursuant to said method.

For the foregoing reasons, we conclude that appellee was entitled to summary judgment on appellants' claims for breach of contract.

Appellants' second assignment of error is not well taken and is overruled.

In their third assignment of error, appellants contend that their claim for fraud was a jury question and, thus,

the trial court erred in granting appellee's motion for summary judgment on their claim for fraud.

A claim for fraud requires proof of the following elements: a) a representation, or, where there is a duty to disclose, concealment of fact; b) which is material to the transaction at hand; c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; d) with the intent of misleading another into relying upon it; e) justifiable reliance upon the representation or concealment; and f) a resulting injury proximately caused by the reliance. *Russ v. TRW* (1991), 59 Ohio St.3d 42, 49.

Upon a review of the evidence submitted by the parties, we are unable to find that the trial court erred in granting summary judgment in favor of appellee on appellants' claim for fraud. The evidence herein does not establish the six elements of fraud.

As mentioned previously, there was no evidence presented by appellants that appellee concealed any facts as to the "365/360" method. Thus, we conclude that appellee was entitled to judgment as a matter of law as to appellant's claim for fraud.

Appellants' third assignment of error is without merit and is overruled.

Appellants' fourth, fifth and sixth assignments of error will be discussed together, since they are made moot by our ruling on appellants' second assignment of error.

Pursuant to App. R. 12(A)(1)(c), a court of appeals need not rule upon an assignment of error when said assignment of error is made moot by a ruling on another assignment of error.

In our ruling upon appellants' second assignment of error, we concluded that there was no breach of contract on the part of appellee. We find that this determination makes appellants' claims for waiver, estoppel and unjust enrichment moot. Thus, we will not address appellants' fourth, fifth and sixth assignments of error.

In their seventh assignment of error, appellants contend that the trial court erred in denying their request for injunctive relief with respect to alleged "releases" sent to putative class members.

We find that the issues pertaining to this appeal do not include class action issues. Thus, we find that appellants have failed to demonstrate any prejudice as a result of the trial court's denial of their request for injunctive relief.

Appellants' seventh assignment of error is without merit and is overruled.

We need not address appellee's cross-assignments of error, because cross-assignments of error by an appellee, who has not appealed, may be considered only when necessary to prevent a reversal. R.C. 2505.22; *Duracote Corp. v. Goodyear Tire & Rubber Co.* (1983), 2 Ohio St.3d 160. Such assignments of error are only for the limited purpose of preventing the reversal of the trial court's judgment. *Bryant v. Lawson Milk Co.* (1985), 22 Ohio App. 3d 69.

Since the trial court judgment is affirmed, appellee's cross-assignments of error are not hereby considered.

Trial court judgment is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

*DAVIS T. MATIA, C.J., AND*

*JOHN F. CORRIGAN, J., CONCUR.*

/s/ Leo M. Spellacy
LEO M. SPELLACY
JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(d), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

| CASE NO. | ASSIGNED JUDGE |
|---|---|
| 086378 | Zingale |

Frances Hamilton VS Ohio Savings Assoc.

## CIVIL CASE STATUS FORM

**DISPOSITION**

| | | |
|---|---|---|
| [ ] | 02 | REASSIGNED |
| [ ] | 03 | REINSTATED (C/A) |
| [ ] | 04 | REINSTATED |
| [ ] | 20 | REFEREE |
| [ ] | 40 | ARBITRATION |
| [ ] | 69 | SUBMITTED |
| [ ] | 81 | JURY TRIAL |
| [ ] | 82 | ARBITRATION DECREE |
| [ ] | 83 | COURT TRIAL |
| [ ] | 85 | PRETRIAL |
| [ ] | 87 | DIS W/O PREJ |
| [ ] | 88 | BANKRUPTCY STAY |
| [ ] | 89 | DIS. W/PREJ |
| [ ] | 91 | DEFAULT-COGNOVITS |
| [ ] | 93 | TRANS TO COURT |
| [ ] | 95 | TRANS TO JUDGE |

NO. JURORS _____

START DATE ___/___/___

END DATE ___/___/___

COURT REPORTER _____

START DATE ___/___/___

END DATE ___/___/___

[ ] PARTIAL [X] FINAL [X] POST CARD

DATE 5/14/91

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AS OF & FOR ___/___/___

Defendants 1/30/91 motion for summary judgment is granted. This court need not address the class certification issue. This is a final appealable order.

Final

CLERK OF COURTS

(Filed May 15 1991)

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 56820

| | | |
|---|---|---|
| FRANCES HAMILTON, ET AL.<br>PLAINTIFFS-APPELLANTS<br>v.<br>OHIO SAVINGS ASSOCIATION, ET AL.<br>DEFENDANTS-APPELLEES | : | JOURNAL ENTRY AND OPINION |

| | |
|---|---|
| DATE OF ANNOUNCEMENT OF DECISION: | MARCH 29, 1990 |
| CHARACTER OF PROCEEDING: | Civil appeal from Common Pleas Court, No. 086,378. |
| JUDGMENT: | REVERSED IN PART, DISMISSED IN PART, AND REMANDED |
| DATE OF JOURNALIZATION: | Apr. 24, 1990 |

APPEARANCES:

| | |
|---|---|
| For Plaintiffs-Appellants: | Steven M. Weiss, Esq.<br>1250 Illuminating Building<br>Cleveland, OH 44113 |
| For Defendants-Appellees: | Hugh M. Stanley, Esq.,<br>1100 Huntington Building<br>Cleveland, OH 44115 |
| | Marc W. Freimuth, Esq.<br>Roy Lachman, Esq.<br>Ohio Savings Plaza<br>1801 East Ninth Street<br>Cleveland, OH 44114 |

MATIA, P.J.:

Plaintiffs-appellants, Frances Hamilton, George Seidel, and Barbara Seidel, appeal from the judgment of the trial court which granted the defendant-appellee's, Ohio Savings Association, first motion for partial summary judgment as to the appellants' claim for violation of the Truth-in-Lending Act and *sua sponte* dismissed without prejudice the remaining common law claims of the appellants and the remaining counterclaim of the appellee-Ohio Savings.

In addition, the appellee-Ohio Savings as cross-appellant has filed a cross-appeal from the trial court's *sua sponte* dismissal of the appellants' common law claims, the *sua sponte* dismissal of the appellee-Ohio Savings' counterclaim for breach of contract, and the granting of the appellants' motion to dismiss the appellee-Ohio Savings' counterclaim for reformation of a contract.

## I. THE FACTS

### A. THE ORIGINAL CLASS ACTION COMPLAINT

On January 30, 1985, appellant-Hamilton filed a class action complaint in the Court of Common Pleas of Cuyahoga County based upon the alleged failure of the appellee-Ohio Savings to comply with the Truth-in-Lending Act (15 U.S.C. § 1601, et seq.) in relation to mortgage loans advanced to the appellant-Hamilton and other unnamed borrowers. The initial complaint alleged that the appellee-Ohio Savings had violated the Truth-in-Lending Act by covertly charging a higher interest rate

than disclosed to the borrower thus resulting in the failure of the loan to amortize over the period of the loan and the need of the borrower to make a final "balloon" payment at the end of the term of the loan. The first complaint also raised the causes of action of fraud and unjust enrichment.

### B. THE FIRST AMENDED CLASS ACTION COMPLAINT

On April 26, 1985, an amended class action complaint was filed with the trial court. The amended class action complaint reiterated the original claims of the appellee-Ohio Savings' violation of the Truth-in-Lending Act, fraud, and unjust enrichment. The amended complaint, however, added George Seidel and Barbara Seidel as plaintiffs and included a common law claim for breach of contract vis-a-vis the mortgage notes executed by the appellants and held by the appellee-Ohio Savings.

### C. APPELLEE'S FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT

On August 19, 1985, the appellee-Ohio Savings filed a partial motion for summary judgment with respect to the appellants' claim of a violation of the Truth-in-Lending Act. The appellee-Ohio Savings' motion for summary judgment was premised upon the application of a one year statute of limitations which prevented the appellants from timely raising any claim of a violation of the Truth-in-Lending Act.

### D. APPELLANT'S SECOND AMENDED COMPLAINT

On July 5, 1988, the appellants filed their second amended class action complaint. The complaint raised the following claims: 1) the appellee-Ohio Savings' miscalculation and/or misstatement of interest payable by the appellants violated the Truth-in-Lending Act; 2) breach of contract (the mortgage notes); 3) fraudulent misrepresentation vis-a-vis the interest rates represented in the mortgage notes; 4) unjust enrichment as a result of the imposition of higher interest rates; 5) conversion as a result of the charge of additional interest rates; 6) estoppel and detrimental reliance; and 7) waiver by the appellee-Ohio Savings.

### E. APPELLEE'S FIRST ANSWER WITH COUNTERCLAIM TO SECOND AMENDED COMPLAINT

On July 22, 1988, the appellee-Ohio Savings filed an answer to the second amended complaint. The answer to the second amended complaint also contained a counterclaim for reformation of the mortgage note executed by appellants-Seidels. The reformation of the mortgage note was allegedly based upon the existence of a mutual mistake which resulted in monthly mortgage payments insufficient to fully amortize the loan made to appellants-Seidels.

### F. APPELLEE'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

On July 22, 1988, the appellee-Ohio Savings filed a second motion for partial summary judgment. The appellee-Ohio Savings' second motion for summary judgment restated the argument that the appellants' claims of a violation of the Truth-in-Lending Act were time barred by a one year statute of limitations. In addition, the appellee-Ohio Savings argued that no genuine issues of material fact existed with regard to the appellants' common law claim for breach of contract. Allegedly, the appellants' mortgage notes clearly indicated the interest rate and the method of computing interest.

### G. APPELLANTS' MOTION TO DISMISS COUNTERCLAIM FOR REFORMATION

On July 28, 1988, the appellants filed a motion to dismiss the appellee-Ohio Savings' counterclaim for reformation. The appellants' motion to dismiss alleged that the counterclaim for reformation was time barred by a ten year statute of limitations.

### H. APPELLEE'S SECOND ANSWER WITH COUNTERCLAIM TO SECOND AMENDED COMPLAINT

On August 31, 1988, the appellee-Ohio Savings filed an amended answer to the second amended class action complaint. The amended answer included an additional counterclaim for breach of contract (the mortgage note) by appellants-Seidels.

## I. APPELLANTS' MOTION TO DISMISS COUNTERCLAIM FOR BREACH OF CONTRACT

On September 23, 1988, the appellants filed a motion to dismiss the appellee-Ohio Savings' counterclaim for breach of contract.

## J. TRIAL COURT GRANTS APPELLANTS' MOTION TO DISMISS COUNTERCLAIM FOR REFORMATION

On October 13, 1988, the trial court entered a judgment entry which provided that "[P]laintiffs' motion to dismiss for failure to state a claim upon which relief can be granted is granted." Thus, the trial court granted the appellants' first motion to dismiss and dismissed the appellee-Ohio Savings' counterclaim for reformation.

## K. TRIAL COURT'S RULING ON MOTIONS FOR SUMMARY JUDGMENT AND *SUA SPONTE* DISMISSAL OF PENDING CLAIMS AND COUNTERCLAIMS

On November 18, 1988, the trial court entered judgment without benefit of a written opinion and ruled that: 1) the appellee-Ohio Savings' first motion for partial summary judgment, with regard to the application of a one year statute of limitations to the claim of a violation of the Truth-in-Lending Act, is granted; 2) the appellee-Ohio Savings' second motion for partial summary judgment is denied; 3) all of the appellants' remaining common law

claims and the appellee-Ohio Savings' remaining counterclaim are *sua sponte* dismissed without prejudice. The trial court specifically stated that:

> "Defendant's Motion for Partial Summary Judgment is granted on the ground that the one year statute of limitations set forth in 15 U.S.C. § 1640(e) applies to the within action. Defendant's second Motion for Summary Judgment is denied as to the allegation that plaintiffs George and Barbara Seidel's claims do not fall within the purview of 15 U.S.C. § 1600, et seq.
>
> "The remainder of plaintiff's complaint and/or any counterclaims are dismissed without prejudice. Plaintiff to pay costs."

## L. APPELLANTS' TIMELY APPEAL

Thereafter, the appellants brought the instant appeal from the trial court's judgment of November 11, 1988 which granted the appellee-Ohio Savings' motion for partial summary judgment on the appellants' claim of a violation of the Truth-in-Lending Act and the trial court's *sua sponte* dismissal of the appellants' common law causes of action of breach of contract, fraud, unjust enrichment, conversion, estoppel, and waiver.

## M. APPELLEE'S-TIMELY APPEAL AS CROSS-APPELLANTS

The appellee-Ohio Savings, as cross-appellant, has filed an appeal from the trial court's judgment of November

11, 1988 which *sua sponte* dismissed the appellants' common law causes of action without prejudice and dismissed without prejudice the appellee-Ohio Savings' counterclaim for breach of contract. The appellee-Ohio Savings also appeals from the dismissal of its counterclaim for reformation vis-a-vis the trial court's granting of the appellants' motion to dismiss as entered on October 13, 1988.

## II. THE APPELLANTS' FIRST ASSIGNMENT OF ERROR

The appellants' first assignment of error is that:

"THE TRIAL COURT ERRED IN VOLUNTARILY DISMISSING APPELLANTS' SECOND AMENDED COMPLAINT AS THE COURT LACKED LEGAL AUTHORITY TO ENTER SAID ORDER."

### A. ISSUE RAISED: TRIAL COURT DID NOT POSSESS THE AUTHORITY TO *SUA SPONTE* DISMISS THE REMAINING CLAIMS OF THE SECOND AMENDED COMPLAINT

The appellants, in their first assignment of error, argue that the trial court erred in dismissing the appellants' second amended complaint. Specifically, the appellants argue that the trial court lacked the authority to *sua sponte* dismiss the appellants' common law claims of breach of contract, fraud, unjust enrichment, conversion, estoppel, and waiver. The appellants argue that the common law causes of action remained pending regardless of

the trial court's disposition of the alleged violation of the Truth-in-Lending Act.

This assignment of error is well taken.

## B. TRIAL COURT POSSESSES LIMITED AUTHORITY TO *SUA SPONTE* DISMISS A CAUSE OF ACTION

A trial court possesses only limited authority to *sua sponte* dismiss either a cause of action or a counterclaim. The primary avenue for involuntary dismissal of a claim involves Civ. R. 41(B).

Civ. R. 41(B), which deals with involuntary dismissal, provides that:

> **"(B) Involuntary dismissal: effect thereof.**
>
> **"(1) Failure to prosecute.** Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.
>
> **"(2) Dismissal; non-jury action.** After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the vent [sic] the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders

judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 if requested to do so by any party.

"**(3) Adjudication on the merits; exception.** A dismissal under this subdivision and any dismissal not provided for in this rule, except as provided in subsection (4) of this subdivision, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

"**(4) Failure other than on the merits.** A dismissal (a) for lack of jurisdiction over the person or the subject matter, or (b) for failure to join a party under Rule 19 or Rule 19.1 shall operate as a failure otherwise than on the merits."

Pursuant to Civ. R. 41(B), a trial court can *sua sponte* dismiss a cause of action or a counterclaim in only two limited situations. These two limited situations involve: 1) a party's failure to prosecute its claim; and 2) a party's refusal and/or failure to obey a court order.

This court, with regard to the ability of a trial court to *sua sponte* dismiss a cause of action or counterclaim, has held that:

"Involuntary dismissal may be made by a court upon its own motion where the plaintiff has either failed to prosecute or has refused to obey a court order or rule. Civ. R. 41(B). The law favors deciding actions on the merits unless the conduct of a party is so irresponsible or dilatory as to justify an involuntary dismissal. *Schreiner v. Karson* (1977), 52 Ohio App. 2d 219, at 223. Involuntary dismissal may be proper where the defendant has shown prejudice because of delay

or where there is an unreasonable delay and plaintiff's cause of action appears empty. *Ketron v. Goldstrom* (Cuy. Cty. Ct. App., March 19, 1981), Unreported Case No. 42564. There was no indication that plaintiff-appellee in this case failed to prosecute or failed to obey any rule or order; therefore, we conclude that an involuntary dismissal under Civ. R. 41(B) was improper. The judgment of the trial court on the second cause of action is reversed and remanded for a hearing on the merits." *Sutter v. Spitznagel, et al.* (June 30, 1983), Cuyahoga App. No. 45851, unreported at 7; see also *Shear v. Shiros, Inc., et al.* (Oct. 3, 1985), Cuyahoga App. No. 49559, unreported.

### C. TRIAL COURT DID NOT POSSESS AUTHORITY TO DISMISS APPELLANTS' PENDING CLAIMS

In the case *sub judice,* the record fails to reveal that the appellants were derelict in the prosecution of their causes of action or that the appellants had failed to comply with an order of the trial court. In addition, the record reveals that the trial court did have subject matter jurisdiction over the appellants' common law claims and was prevented from *sua sponte* dismissing the appellants' common law claims pursuant to Civ. R. 12(H). See *Fox v. Eaton Corp.* (1976), 48 Ohio St. 2d 236. Clearly, the trial court did not possess the legal authority to *sua sponte* dismiss the appellants' pending common law claims for breach of contract, fraud, unjust enrichment, conversion, estoppel, and waiver.

Therefore, the trial court erred in *sua sponte* dismissing the appellants' common law causes of action and the appellants' first assignment of error is well taken.

## III. THE APPELLANTS' SECOND ASSIGNMENT OF ERROR

The appellants' second assignment of error is that:

> "THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANTS' TRUTH-IN-LENDING CLAIMS WERE TIME-BARRED WHERE THE EVIDENCE SUBMITTED TO THE TRIAL COURT RAISED GENUINE FACTUAL ISSUES AS TO THE APPLICABILITY OF EQUITABLE TOLLING PRINCIPLES."

### A. THIS COURT IS WITHOUT AUTHORITY TO REVIEW THE APPELLANTS' SECOND ASSIGNMENT OF ERROR

This court is without authority to review the appellants' second assignment of error in light of the disposition of the appellants' first assignment of error which found the trial court was without authority to *sua sponte* dismiss the appellants' common law causes of action. The continued viability of the appellants' pending claims before the trial court precluded the existence of any final appealable order with regard to trial court's granting of the appellee-Ohio Savings' first motion for partial summary judgment vis-a-vis a one year statute of limitations and the claim of a violation of the Truth-in-Lending Act.

## B. THE SUPREME COURT OF OHIO AND FINAL APPEALABLE ORDERS

The Supreme Court of Ohio, in *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St. 3d 86 established that in cases which contain multi-claims and/or multi-parties, an order of a trial court is *final* and *appealable* to the Court of Appeals only if the order in question comports with both R.C. 2505.02 and Civ. R. 54(B).

The Supreme Court of Ohio, in *Chef Italiano Corp. v. Kent State Univ., supra,* provided and [sic] in-depth analysis of the vexatious dilemma of orders that are not appealable to the Court of Appeals and stated that:

> "R.C. 2505.02 defines three types of final orders: (1) an order affecting a substantial right in an action which in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding or made upon summary application after judgment; or (3) an order vacating or setting aside a judgment or granting a new trial. In this case, we will only discuss the first type of final order, which is an order affecting a *substantial right* which *determines* an action and *prevents a judgment.*
>
> "A substantial right is a ' * * * legal right entitled to enforcement and protection by law[.]' *In re Estate of Wyckoff* (1957), 166 Ohio St. 354, 358, 2 O.O. 2d 257, 260, 142 N.E. 2d 660, 664. A court order which deprives a person of a remedy which he would otherwise possess deprives that person of a substantial right.
>
> "To be final, an order must also determine an action and prevent a judgment. See *General*

*Electric Supply Co. v. Warden Electric, Inc.* (1988), 38 Ohio St. 3d 378, 528 N.E. 2d 195, syllabus. Furthermore, a final order must also comply with Civ. R. 54(B), if applicable. See *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St. 2d 158, 3 O.O. 3d 174, 359 N.E. 2d 702.

"Civ. R. 54(B) applies to those situations where there is more than one claim for relief presented or multiple parties are involved in an action, and where the lower court has rendered a final judgment, pursuant to R.C. 2505.02, with respect to fewer than all of the parties or to fewer than all of the claims. The purposes of Civ. R. 54(B) are ' " * * * to make a reasonable accommodation of the policy against piecemeal appeals with the possible injustice sometimes created by the delay of appeals" * * * as well as to insure that parties to such actions may know when an order or decree has become final for purposes of appeal * * * .' (Citations omitted.) *Pokorny v. Tilby Dev. Co.* (1977), 52 Ohio St. 2d 183, 186, 6 O.O. 3d 416, 417, 370 N.E. 2d 738, 739-740.

"An order of a court is a final, appealable order only if the requirements of both Civ. R. 54(B), if applicable, and R.C. 2505.02 are met. * * * Conversely, the October 6, 1987 order, as it applies to Kent State, does comport with R.C. 2505.02 but fails to meet the 'no just reason for delay' requirement of Civ. R. 54(B). Thus, the October 6, 1987 order is likewise not appealable. While it is a final order pursuant to R.C. 2505.02, it is not appealable because it does not comply with Civ. R. 54(B).

"This case clearly shows the inter-relationship between R.C. 2505.02 and Civ. R. 54(B) in a

> multi-claim and multi-party action. Since neither of the orders in this case is a final, appealable order, we are, as was, and is, the court of appeals, without jurisdiction to review these two orders. The court of appeals was correct in dismissing C.A. No. 1904, but should have done so on the basis that the order was not final and appealable. * * * " *Chef Italiano Corp. v. Kent State Univ., supra,* at 87. (Footnotes omitted.) (Emphasis in original.)

In the case *sub judice,* the trial court granted the appellee-Ohio Savings' partial motion for summary judgment on the basis that the appellants' claim of violation of the Truth-in-Lending Act was barred by a one year statute of limitations. The order of the trial court, in granting the appellee-Ohio Savings' partial motion for summary judgment, deprived the appellants of a substantial remedy and thus was final pursuant to R.C. 2505.02.

### C. PENDING CLAIMS PREVENTED TRIAL COURT'S DISPOSITION OF SUMMARY JUDGMENT FROM BECOMING APPEALABLE

The existence of the appellants' common law claims (in addition to the appellee-Ohio Savings' counterclaim), however, necessitated the inclusion of the Civ. R. 54(B) language of "no just reason for delay" within the trial court's journal entry in order that the disposition of the appellants' claim for violation of the Truth-in-Lending Act become appealable. Without the language of Civ. R. 54(B), the order which granted the appellee-Ohio Savings' partial motion for summary judgment was not appealable and subject to revision by the trial court. Cf.

*Jarrett v. Dayton Osteopathic Hosp.* (1985), 20 Ohio St. 3d 77; *Maxey v. Lenigar* (1984), 14 Ohio App. 3d 458.

It should also be noted that the inclusion of the Civ. R. 54(B) language of "no just reason for delay" would not have automatically resulted in the appealability of the trial court's orders in light of this court's holdings in *Aldrete v. Foxboro Co.* (1988), 49 Ohio App. 3d 81 and *Board of Education School District v. Regner Assoc., et al.* (Oct. 26, 1989), Cuyahoga App. Nos. 56053, 56054, 56060, unreported. In both of these cases, this court has held that where a plaintiff has raised multiple theories of recovery arising out of a single set of facts, the dismissal of one theory of recovery is not a final appealable order regardless of the usage of the Civ. R. 54(B) language in the trial court's order of dismissal and/or judgment.

Therefore, the appellant's second assignment of error is not ripe for review and dismissed.

Having concluded a review of the appellants' two assignments of error, this court shall next proceed to a review of the appellee-Ohio Savings' two assignments of error as raised upon a cross-appeal.

## IV. APPELLEE'S FIRST ASSIGNMENT OF ERROR ON CROSS-APPEAL

The appellee-Ohio Savings' first assignment of error on cross-appeal is that:

> "THE TRIAL COURT ERRED BY NOT DISMISSING PLAINTIFFS' COMMON LAW CLAIMS WITH PREJUDICE."

### A. ISSUE RAISED: TRIAL COURT SHOULD HAVE DISMISSED APPELLANTS' COMMON LAW CAUSES OF ACTION WITH PREJUDICE

The appellee-Ohio Savings, in its first assignment of error upon cross-appeal, argues that the trial court erred in not dismissing the appellants' common law causes of action *with prejudice.* Specifically, the appellee-Ohio Savings argues that the trial court possessed the legal authority to *sua sponte* dismiss the appellants' common law causes of action and that the involuntary dismissal should have been *with prejudice.*

This assignment of error is not well taken.

### B. TRIAL COURT POSSESSED NO AUTHORITY TO DISMISS THE APPELLANTS' PENDING CLAIMS

As dealt with in the appellants' first assignment of error, the trial court did not possess the legal authority to *sua sponte* dismiss the appellants' common law causes of action. The appellants had not failed to prosecute their claims nor had the appellants disobeyed any orders of the trial court. In addition, the trial court did have proper subject matter jurisdiction over the appellants' common law causes of action which independently survived any dismissal of the appellants' claim of a violation of the Truth-in-Lending Act.

Therefore, the appellee-Ohio Savings' first assignment of error upon cross-appeal is not well taken.

## V. THE APPELLEE'S SECOND ASSIGNMENT OF ERROR ON CROSS-APPEAL

The appellee-Ohio Savings' second assignment of error upon cross-appeal is that:

> "THE TRIAL COURT ERRED IN DISMISSING THE OHIO SAVINGS BANK'S COUNTERCLAIMS FOR REFORMATION AND BREACH OF CONTRACT."

### A. ISSUE RAISED: TRIAL COURT ERRED IN DISMISSING THE COUNTERCLAIMS FOR REFORMATION AND BREACH OF CONTRACT

The appellee-Ohio Savings, in its second assignment of error upon cross-appeal, argues that the trial court erred in dismissing its counterclaims for breach of contract and reformation of contract. Specifically, the appellee-Ohio Savings argues that the trial court erred in *sua sponte* dismissing the counterclaim for breach of contract and also erred in granting the appellants' motion to dismiss the appellee-Ohio Savings' counterclaim for reformation.

This assignment of error is well taken in part.

### B. TRIAL COURT POSSESSED NO LEGAL AUTHORITY TO DISMISS COUNTERCLAIM FOR BREACH OF CONTRACT

As discussed with regard to the appellants' first assignment of error, the trial court did not possess the

legal authority to *sua sponte* dismiss the appellants' common law causes of action. In addition, the trial court did not possess the legal authority to *sua sponte* dismiss the appellee-Ohio Savings' counterclaim for breach of contract. The appellee-Ohio Savings' counterclaim for breach of contract continued to exist regardless of the disposition of the appellants' claim of a violation of the Truth-in-Lending Act or the dismissal of the appellee-Ohio Savings' counterclaim for reformation. Therefore, the trial court did err in *sua sponte* dismissing the appellee-Ohio Savings' counterclaim for breach of contract.

### C. TRIAL COURT'S DISMISSAL OF COUNTERCLAIM FOR REFORMATION IS NOT A FINAL APPEALABLE ORDER

However, the remaining argument of the appellee-Ohio Savings, that the trial court erred in granting the appellants' motion to dismiss the appellee-Ohio Savings' counterclaim for reformation, is not ripe for review. The order of the trial court, which dismissed the appellee-Ohio Savings' counterclaim for reformation, is not appealable to this court in light of the continued existence of the appellants' common law causes of action and the existence of the appellee-Ohio Savings' counterclaim for breach of contract. Cf. *Aldrete v. Foxboro Co., supra; Board of Education School District v. Regner Assoc., et. al., supra.* This court is without authority to review the dismissal of the appellee-Ohio Savings' counterclaim for reformation vis-a-vis the granting of the appellants' motion to dismiss.

The appellee-Ohio Savings' second assignment of error is thus well taken in part and dismissed in part.

Therefore, the judgment of the trial court, which *sua sponte* dismissed the appellants' common law causes of action, is reversed. In addition, the trial court's *sua sponte* dismissal of the appellee's counterclaim for breach of contract is reversed.

The appellants' appeal, with regard to the granting of the appellee's partial motion for summary judgment, is dismissed for a lack of a final appealable order. The appellee's appeal, with regard to the trial court's granting of the motion to dismiss the counterclaim for reformation, is also dismissed for lack of a final appealable order.

Judgment accordingly.

This cause is reversed in part and dismissed in part, consistent with the opinion herein.

It is, therefore, considered that said appellants and appellee equally share the costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

FRANCIS E. SWEENEY, J. and
*PAUL H. MITROVICH, J., CONCUR.

/s/ David T. Matia
DAVID T. MATIA
PRESIDING JUDGE

*SITTING BY ASSIGNMENT:

Judge Paul H. Mitrovich, of the Lake County Common Pleas Court.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

| CASE NO. | ASSIGNED JUDGE |
|---|---|
| 086378 | SAMUEL ZINGALE |

Frances Hamilton, et al. VS. The Ohio Savings Association

## CIVIL CASE STATUS FORM

**DISPOSITION**

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|---|---|---|
| [ ] | 02 | REASSIGNED |
| [ ] | 03 | REINSTATED (C/A) |
| [ ] | 04 | REINSTATED |
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NO. JURORS _____

START DATE ___/___/___

END DATE ___/___/___

COURT REPORTER _____

START DATE ___/___/___

END DATE ___/___/___

[ ] PARTIAL [X] FINAL [X] POST CARD

CLERK OF COURTS

(Filed Nov. 18, 1988)

DATE 1/15/88

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AS OF & FOR ___/___/___

Defendant's Motion for Partial Summary Judgment is GRANTED on the ground that the one year statute of limitations set forth in 15 U.S.C. 1640(e) applies to the within action. Defendant's Second Motion for Summary Judgment is DENIED as to the allegations that Plaintiffs George and Barbara Seidel's claims do not fall within the purview of 15 U.S.C. 1640 et seq. The remainder of Plaintiffs' Complaint and/or any counter claims are dismissed without prejudice. Plaintiff to pay costs.

**CASE STATUS FORM**

CASE NO: 086378

ASSNG. JUDGE Griffin

OTHER JUDGE _____

/s/ Francis E. Hamilton vs The Ohio Savings Assoc.

**SCHEDULE**

DESCRIPTION

[X] PLTF.
[ ] DEFT.
[ ] COURT

[ ] GRT'D.
[X] O.R.
[ ] H & S

DATE 1-22-86

[ ] SCHEDULE
[ ] JURY TRIAL
[ ] COURT TRIAL
[ ] PRETRIAL
[ ] STATUS CALL
[ ] DEFAULT HEARING

[ ] RE-SCHEDULE

DATE _____

TIME _____

**DISPOSITION**

| | | |
|---|---|---|
| [ ] | 40 | ARBITRATION |
| [ ] | 20 | REFEREE |
| [ ] | | SUPPLEMENTAL |
| [ ] | | ATT'Y TO SUBMIT |
| [ ] | 02 | RE-ASSIGNED |
| [ ] | 04 | REINSTATED |
| [ ] | 81 | JURY TRIAL |
| [ ] | 82 | ARB FIN DECREE |
| [ ] | 83 | COURT TRIAL |

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| [ ] | 85 | PRETRIAL |
| [ ] | 87 | DIS. W/O PREJ. |
| [ ] | 89 | DIS. W/PREJ. |
| [ ] | 91 | DEFAULT-COGNOVITS |
| [ ] | 93 | TRANSF. TO COURT |
| [ ] | 95 | TRANSF. TO JUDGE |

[ ] PARTIAL [ ] FINAL [X] POST CARD

COURT REPORTER

NAME _____

DAY: _____

DATE 1-27-86 (NUNC PRO TUNC
ENTRY AS OF AND FOR _____)

Inasmuch as it appears that pltfs. will not suffer irreparable harm the motions for temporary restraining order and preliminary injunction are denied.

/s/ Burt W. Griffin
JUDGE

**§ 1640. Civil liability**

**(e) Jurisdiction of courts; limitations on actions.** Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this title [15 USCS §§ 1601 et seq.] in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

Supreme Court, U.S.
FILED
DEC 21 1994
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No. 94-974

In The

# Supreme Court of the United States

October Term, 1994

OHIO SAVINGS BANK, f/k/a
OHIO SAVINGS ASSOCIATION,

*Petitioner,*

v.

FRANCES HAMILTON,
BARBARA SEIDEL, and
GEORGE SEIDEL,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The Supreme Court Of Ohio**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Is the equitable tolling doctrine applicable to the Truth in Lending Act's ("TILA's" or "the Act's") one-year statute of limitations where the Act's plain language, the congressional purpose underlying the Act, and the circumstances of the case at issue, *i.e.*, remaining factual issues as to whether the lender fraudulently concealed its TILA violations, all indicate that equitable tolling will serve the Act's remedial purpose?

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No. 94-974

In The

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OHIO SAVINGS BANK, f/k/a
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FRANCES HAMILTON,
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GEORGE SEIDEL,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The Supreme Court Of Ohio**

## RESPONDENTS' BRIEF IN OPPOSITION

## INTRODUCTION

Robert E. Sweeney, counsel of record for Respondents Frances Hamilton, Barbara Seidel and George Seidel, hereby opposes the petition of Ohio Savings Bank, f/k/a Ohio Savings Association, for writ of certiorari to review the unanimous judgment of the Ohio Supreme Court entered on August 31, 1994.

## RESPONDENTS' STATEMENT OF THE CASE

Respondents Frances Hamilton ("Hamilton") and Barbara and George Seidel ("the Seidels") are ordinary homeowners who took out 29-year fixed rate home mortgages with petitioner Ohio Savings Bank ("Ohio Savings"). The loans were executed in 1976 and 1977, respectively; all loan documents, including the federally mandated TILA disclosure forms, mortgage application, mortgage application acceptance, mortgage note, and consecutive monthly payment notices assured Hamilton and the Seidels (Hamilton and the Seidels also referred to as "Borrowers") that their home loans would amortize fully after 29 years of consecutive, defined monthly payments made at their respective, disclosed per annum interest rates.

In Fall 1984, approximately 8-9 years after consummation of the mortgage transactions, Borrowers discovered the following from a mathematician/economist:

(1) through its misuse of the 365/360 interest calculation method[1], Ohio Savings actually

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[1] The common interest calculation methods for residential mortgages are the 365/365 method and the 360/360 method. Both methods produce the same interest over a calendar year of 365 days. Only the 365/360 method used by Ohio Savings increases a mortgage's disclosed per annum interest rate by extracting an inflated interest charge. In the 365/360 method, the lender creates a hypothetical 360-day year, but charges interest for 365 days. Thus, the lender gains five days of extra interest yearly which compounds over the life of the loan. Comparing the two common methods and the 365/360 method demonstrates the mechanics of the added interest charge:

was charging Borrowers an additional .12% per annum interest beyond Borrowers' disclosed rates;

(2) Borrowers' loans would not amortize fully after 29 years of defined monthly payments at the stated per annum interest rate because Ohio Savings actually was servicing their loans on the basis of the 365/360 interest calculation method while promising Borrowers per annum rates, monthly payments and amortization by the 360/360 interest calculation method;

---

Interest on $100 for one year at 10%
Interest = time x rate of interest x principal:
365/365 method – 365/365 x 10% x $100 = $10
360/360 method – 360/360 x 10% x $100 = $10
365/360 method – 365/360 x 10% x $100 = $10.13

*See, generally,* Thorndike, *The Thorndike Encyclopedia of Banking and Financial Tables,* (1973) p. xiii and *American Timber and Trad. Co. v. First Nat. Bank of Oregon,* (C.A. 9, 1973), 511 F.2d 980, 981, n1.

The following calculation shows how Ohio Savings used the 365/360 method to inflate mortgagors' promised rates and extract 370 days' worth of interest from one calendar year:

365/360 x 365 days = 1.013 x 365 = 370 days.

Of the three interest calculation methods, only the 365/360 method can be manipulated to achieve undisclosed gain. Representative Wright Patman, then-Chair of the House Committee on Banking and Currency, described the 365/360 method as a "misleading and long-outdated practice for calculating interest rates which many have used to extract interest payments beyond what they state the interest rate is, and what they are entitled to." Patman Statement, Cong. Rec., July 24, 1972, p. 24,914.

(3) to retire their loans as promised at term end, Borrowers would need to make an undisclosed final balloon payment nearly 18 times greater than their respective defined, monthly payments.[2]

On January 30, 1985, Hamilton filed a class action complaint against Ohio Savings; three months later, an amended complaint added the Seidels. Borrowers alleged numerous causes of action against Ohio Savings, including breach of contract, fraud, unjust enrichment, and violations of the TILA. The TILA violations entailed the following nondisclosures and/or misrepresentations made by Ohio Savings on the disclosure form mandated by Regulation Z, promulgated under the TILA at 12 C.F.R. § 226:

(1) misrepresentation and understatement of the per annum contract interest rates;

(2) misrepresentation and understatement of the total of payments and total finance charges;

(3) failure to disclose to Borrowers that a balloon payment would be needed to retire the loans within their stated terms.

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[2] Hamilton's loan was for $44,000; her defined monthly payment was $364.79; her disclosed rate was 9.25%; the undisclosed balloon payment needed to retire her loan at term end would be $6,493. Seidels' loan was for $32,400; their defined monthly payment was $262.76; their disclosed rate was 9%; the undisclosed balloon payment to retire their loan would be $4,702.34.

Borrowers presented evidence demonstrating that Ohio Savings used a series of misleading loan documents (mortgage application, mortgage acceptance, mortgage note, monthly statement, TILA disclosure form) in order to conceal or obfuscate its TILA violations. All documents bore the same misrepresentations as to Borrowers' per annum interest rates, defined monthly payments and amortization schedules, *i.e.*, full amortization promised after 29 years of consecutive monthly payments.

Borrowers also demonstrated that Ohio Savings presented them with a monthly statement that reiterated the misleading information given them when executing their loans. Indeed, mortgagors who checked their mortgage payments against a standard monthly table would find their payment accorded exactly with the per annum rate disclosed on all mortgage documents. Unbeknownst to Borrowers, Ohio Savings actually was extracting undisclosed, enhanced per annum interest of .12%. Since the monthly payments were based on the disclosed rates (*e.g.*, 9%), but Ohio Savings was amortizing the payments at a higher rate (*e.g.*, 9.12%), the loans, from inception, were out of sync. The amortization problem grew and compounded over the life of the loans. Ultimately, the problem prevents the loans from amortizing as promised.

Ohio Savings claimed the misrepresentations, nondisclosures and looming balloon payments were innocent "mistakes". However, discovery revealed that 2,700 existing mortgages had the same "mistakes". Thus, factual issues arose as to whether Ohio Savings had used different interest calculation methods and made misrepresentations to Borrowers, including those on the TILA form, in order to fraudulently conceal Borrowers' true mortgage

costs. Borrowers demonstrated the interest rate switch allowed Ohio Savings to hide its practice of extracting extra, undisclosed interest. Ohio Savings then could compete with other lenders by advertising one rate but surreptiously enhancing the stated rate. Borrowers demonstrated that the series of misleading loan documents, wherein Borrowers' disclosed payments were calculated with the 360/360 method, lulled Borrowers into believing that Ohio Savings was servicing their loans with the disclosed per annum interest rates, not rates .12% higher. Thus, Borrowers argued that Ohio Savings was able to conceal its TILA violations from them until the Act's one-year statute of limitations had expired or, in the alternative, that Ohio Savings committed the violations in a way that they concealed themselves.

Although lower Ohio courts dismissed Borrowers' claims on Ohio Savings' summary judgment motion, the Ohio Supreme Court unanimously reversed on all counts. Ohio Supreme Court decision, with attached Notice of Erratum, App. 1-9. The Ohio Supreme Court found Borrowers' TILA claims subject to equitable tolling on the basis of *Jones v. TransOhio Savings Association*, 747 F.2d 1037 (6th Cir. 1984) ("Jones"), which determined that the TILA's one-year statute of limitations may be equitably tolled to prevent unjust results in a particular case, *i.e.*, where "allegations of fraudulent concealment which by their very nature, and if true, [would] serve to make compliance with the limitations period imposed by Congress an impossibility." *Id.* at 1041. The Ohio Supreme Court relied on *Jones* and on Borrowers' evidence, which demonstrated that Ohio Savings' TILA violations were

fraudulently concealed, to support its decision to remand Borrowers' TILA claims to the factfinder.

## REASONS FOR DENYING THE WRIT

The equitable tolling doctrine's long and venerable history favors its applicability under proper circumstances unless explicit statutory language and/or clear Congressional intent to the contrary appear. Ohio Savings asks this Court to grant its petition for writ of certiorari and to find that the equitable tolling doctrine does not apply to the TILA's one-year statute of limitations. The petition should be denied because this Court already has prescribed a clear analytical framework for courts to use when considering whether the doctrine should be applied. Courts are directed to determine if equitable tolling would promote the Congressional purpose behind the statute at issue. *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 427, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941 (1965) ("Burnett"). In the within action, as discussed *infra*, Part II, the plain statutory language and the Congressional purpose of the TILA support applicability of equitable tolling.

Moreover, in rendering its decision, the Ohio Supreme Court conducted a thorough analysis of federal law on the applicability of the equitable tolling doctrine. The Ohio Supreme Court properly held that Borrowers' TILA claims were subject to equitable tolling. Since factual questions remained as to whether Borrowers could take advantage of this equitable doctrine, the Ohio high court reversed the summary dismissals by lower Ohio

courts and remanded to the trial court for further consistent proceedings.

Ohio Savings asks this Court to apply the analysis of *Lampf v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991) ("Lampf"), an action brought under § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. § 78j(b) and Securities Exchange Commission Rule 10(b)-5, 17 C.F.R. § 240.10b-5 (1990), to hold the equitable tolling doctrine inapplicable to TILA claims of these Borrowers. *Lampf*, however, is inappropriate and cannot provide the analytical model for considering application of the equitable tolling doctrine to this TILA action where Borrowers allege they could not reasonably discover Ohio Savings' fraudulently concealed TILA violations until 8-9 years after loan consummations. In *Lampf*, the § 10(b) provision at issue did not provide for private remedial action and did not contain its own statute of limitations. Since Congress had never expressed its own intent, this Court created both a private right and a statute of repose for actions commenced under § 10(b) and Rule 10(b)-5. In the instant cause, Congress crafted the TILA to allow enforcement through private party litigation. Congress indicated its intent to treat different types of TILA actions in different ways. Thus, Congress specified that TILA recission actions would be subject to a 3-year period of repose. Other private TILA actions would be governed by a one-year statute of limitations. TILA, 15 U.S.C. §§ 1635(f), 1640(e).

Ohio Savings claims that encouraging private enforcement of the TILA through application of the

equitable tolling doctrine does not effectuate the Congressional purpose underlying the Act. However, as set forth below, the Act's remedial intent and plain language mandate otherwise.

Accordingly, this Court should deny Ohio Savings' petition for certiorari of this matter.

## I. THE EQUITABLE TOLLING DOCTRINE IS APPLICABLE TO TOLL THE STATUTE OF LIMITATIONS UNLESS CONGRESS STATES OTHERWISE.

Ohio Savings boldly asks this Court to find the equitable tolling doctrine inapplicable to the TILA's one-year statute of limitations. Such holding would depart from the historic practice of tolling a statute of limitations to prevent the basic injustice of allowing a wrongdoer to profit when the victim cannot reasonably discover the wrong until he/she is without remedy. "As a general rule, the doctrine of equitable tolling is read into every federal statute of limitations." *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946). As stated in *Atlantic City Electric Co. v. General Electric Co.*, 312 F.2d 236, 241 (2d Cir. 1962), cert. denied, 373 U.S. 909, 83 S.Ct. 1298, 10 L.Ed.2d 411 (1963): "The policy is so strong that it is applicable unless Congress expressly provides to the contrary in clear and unambiguous language." Thus, this Supreme Court has repeatedly approved application of equitable tolling. *See Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 22 L.Ed. 636 (1874) (Bankruptcy Act of 1867); *Exploration Co., Ltd. v. United States*, 247 U.S. 435, 38 S.Ct. 571, 62 L.Ed. 1200 (1918) (Act of March 2, 1891, 26 Stat. 1093, to vacate land patents);

*Holmberg v. Armbrecht, supra* (Federal Farm Loan Act); *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959) (Federal Employers' Liability Act). *Cf. Zipes v. Trans World Airlines*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (Title VII time requirement for filing discrimination charge with Equal Employment Opportunity Commission held not to be jurisdictional requirement but, like a statute of limitations, subject to equitable tolling). Ohio Savings raises no argument sufficient to defeat application of the venerable equitable tolling doctrine to the instant case.

### A. The United States Supreme Court Has Given Sufficient Instruction to Courts Considering Whether Application of the Equitable Tolling Doctrine Is Proper to Toll the Statute of Limitations in a Particular Case.

The Supreme Court has established an analytical framework for courts to use when considering applicability of the equitable tolling doctrine to toll a federal statute or limitations in a particular situation. *Burnett, supra*, 380 U.S. at 427, 85 S.Ct. at 1054, 13 L.Ed.2d 941 instructs: "[T]he basic inquiry is whether the congressional purpose is effectuated by tolling the statute of limitations in given circumstances."

In the instant case, Ohio Savings asserts that the analysis used by this Court in *Lampf v. Gilbertson, supra*, should control its reasoning herein. However, the *Lampf* decision arose from a claim filed under § 10(b) of the Securities Exchange Act, *supra*, and Rule 10b-5 promulgated thereunder. In *Lampf*, this Court found Congress

had manifested its clear intent to deny applicability of the equitable tolling doctrine to federal securities claims. The *Lampf* Court found the Securities Exchange Act's one-and-three year limitations and periods were inconsistent with equitable tolling because the one-year period began after discovery of the facts constituting the violation, making tolling unneeded, and the three-year limit represented a period of repose, which the Court found incompatible with tolling. 501 U.S. at 363, 111 S.Ct. at 2782.

The instant claims arising under the TILA are easily distinguishable from those at issue in *Lampf*. Authorization of private claims under the TILA and under the Securities Exchange Act § 10(b) spring from critically and fundamentally different sources. Congress purposefully provided for private suits under the TILA through 15 U.S.C. § 1640(e), which provides:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

Conversely, the texts of § 10(b) and Rule 10b-5 do not authorize private claims. Private § 10(b) claims arise via judicial creation as implied under the statute. *See Lampf, supra*, at 501 U.S. 358, 111 S.Ct. 2779, 2780, stating: "we have made no pretense that it was Congress' design to provide the [private] remedy afforded" and citing from

*Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196, 96 S.Ct. 1375, 1382, 47 L.Ed.2d 668 (1976): "("[T]here is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy.") (footnotes omitted)". In *Lampf*, therefore, the provisions at issue contained no statute of limitations. This Court was asked to create an appropriate statute of limitations and then to determine whether the equitable tolling doctrine was applicable in actions under § 10(b) and Rule 10b-5.

By contrast, in the instant TILA action, Congress evidenced clear intent to put an absolute limitation on only one specific type of claim under the TILA, *i.e.*, claims for recission under 15 U.S.C. § 1635(f), which are barred after three years. Other claims are governed by 15 U.S.C. § 1640(e), *supra*, and by its one-year limitations period. Following *Lampf*'s reasoning that a period of repose is inconsistent with equitable tolling, *Lampf, supra*, 501 U.S. at 363, 111 S.Ct. at 2782, Ohio Savings might argue that TILA private claims seeking recission may not benefit from the equitable tolling doctrine. However, since the instant claims are not for recission, this action under TILA § 1640(e) must be interpreted in light of both the general rule of *Holmberg v. Ambrecht, supra*, 327 U.S. at 397, 66 S.Ct. at 585, 980 L.Ed.743, ("equitable tolling is read into every federal statute of limitations") and the directive of *Burnett, supra*, 380 U.S. at 427, 85 S.Ct. at 1054, 13 L.Ed.2d 941 (courts to ask whether equitable tolling will effectuate Congressional purpose in a given case).

Courts considering applicability of the equitable tolling doctrine need no additional instruction beyond that given in *Burnett, supra. Burnett* directs that determination of applicability of the equitable tolling doctrine requires

consideration of the statutory purpose in light of the particular circumstances of the case at issue. Flexibility is required in such a fact-oriented analysis. *See King v. State of California*, 784 F.2d 910, 915 (9th Cir. 1986) ("King"), holding (1) that the one-year statute of limitations for Borrowers' TILA action against a lender for failure to make material disclosures may be equitably tolled in proper case and (2) issues of lender's alleged fraudulent concealment and whether equitable tolling is proper require evaluation of specific claims and "involve factual determinations". *Ibid.*

Accordingly, this Court must refuse Ohio Savings' petition to find the *Lampf* analysis suitable for the within case. In *Burnett, supra*, this Court already has given guidance and needed flexibility to courts considering applicability of the equitable tolling doctrine.

**B. In the Instant Case, the Ohio Supreme Court Correctly Applied the Proper Test to Determine that the Equitable Tolling Doctrine Is Applicable to Toll the Statute of Limitations in an Action Wherein Home Mortgagors Alleged Their Mortgage Lender Fraudulently Concealed Its Violations of the Truth In Lending Act ("TILA" or "the Act").**

In the instant case, the Ohio Supreme Court referred directly to federal law developed in *Jones, supra*, and *King, supra*, in holding that the TILA's one-year statute of limitations was subject to the equitable tolling doctrine in a proper case, if tolling effectuated Congress' purpose. The Ohio court determined that purpose was to provide a

meaningful disclosure of credit costs and to prevent divergent and/or fraudulent lending practices. App. 5, 6. The Ohio court found tolling in this case would further the declared Congressional purpose. It directed that remaining factual questions be remanded to the trial court as to when Borrowers reasonably could have discovered Ohio Savings' TILA violations and as to whether they asserted their claims within one year from that date. *See* Rule 56 of Ohio Rules of Civil Procedure (construing evidence in light most favorable to the nonmovant, summary judgment not proper when genuine issues of material fact remain).

Ohio Savings vainly asserts that Ohio's high court "misinterpreted Congressional intent" in allowing litigation of Borrowers' TILA claims. Ohio Savings groundlessly claims that the Ohio Supreme Court's holding[3] would render the Act's statute of limitations meaningless. Petition 19. Ohio Savings' argument must fail, for the Ohio Supreme Court based its decision squarely on *Jones, supra,* which authorizes application of the equitable tolling doctrine to those violations and nondisclosures that have an element of purposeful concealment. 747 F.2d at 1041. Borrowers have set forth evidence establishing Ohio Savings fraudulently concealed its TILA violations.

The Ohio Supreme Court applied the proper analysis to hold the equitable tolling doctrine applicable to toll the

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[3] The Ohio Supreme Court held "[T]he time within which appellants are required to bring an action against the bank may be tolled until they discovered or had reasonable opportunity to discover the alleged fraud or nondisclosure that formed the basis of their Truth in Lending action". App. 6.

one-year statute of limitations governing Borrowers' TILA Claims. As set forth below, numerous federal decisions, including *Jones* and *King*, analyzed and provided the Congressional purpose behind the TILA and provide sound foundation for the Ohio Supreme Court's decision.

## II. THE PLAIN LANGUAGE AND THE CONGRESSIONAL PURPOSE OF THE TILA INDICATE THAT ITS ONE-YEAR STATUTE OF LIMITATIONS CAN BE EQUITABLY TOLLED IN A PROPER CASE.

The two-fold Congressional purpose behind the TILA is facilitating consumers' acquisition of the best credit terms and protecting consumers from divergent and/or fraudulent practices stemming from uninformed use of credit. *Jones, supra,* at 1040. The purpose of the TILA is set forth at 15 U.S.C. § 1601:

> § 1601. Congressional findings and declaration of purpose
>
> (a) The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . .

In *Mourning Family Publications Service, Inc.*, 411 U.S. 356, 363, 93 S.Ct. 1652, 1657, 36 L.Ed.2d 318 (1973)

("Mourning"), this Court studied the legislative history of the TILA and noted that Congressional hearings revealed consumers often remained ignorant of the nature of their credit obligations and the cost of deferring payment. *Mourning, supra,* citing Congressional history at H.R. Rep. No. 1040, 90th Cong., 1st Sess., 13; S. Rep. No. 392, 90th Cong. 1st Sess., 1-2 (1967). The Court noted that to accomplish its consumer oriented goal for the TILA, Congress "determined to lay the structure of the Act broadly." 411 U.S. at 365, 93 S.Ct. at 1658, 36 L.Ed.2d 318.

Lower courts called upon to determine whether the TILA's one-year statute of limitations was subject to equitable tolling uniformly agreed that the Congressional intent and the declared purpose behind the TILA mandated equitable tolling in the proper case to effectuate the Act's purposes.

### A. The Remedial Purpose of the TILA Authorizes Application of the Equitable Tolling Doctrine to the Act's One-Year Statute of Limitations.

The declared purpose of the TILA, 15 U.S.C. § 1601, *supra,* leaves no doubt that the Act is remedial consumer legislation. All courts have so interpreted. *See Mourning, supra,* 411 U.S. at 363, 93 S.Ct. at 1657, 36 L.Ed.2d 318 (1973) (citing legislative history); *Jones, supra,* at 1037, 1040; *Bizier v. Globe Financial Services, Inc.,* 654 F.2d 1, 3 (1st Cir. 1981) ("Bizier"); *James v. Home Construction Co. of Mobile, Inc.,* 621 F.2d 727, 729 (5th Cir. 1980); *Johnson v. McCrackin - Sturman Ford, Inc.,* 527 F.2d 257, 262 (3d Cir. 1975); *Eby v. Reb Realty, Inc.,* 495 F.2d 646, 650 (9th Cir. 1974); *N.C. Freed Co., Inc. v. Board of Governors of Federal*

*Reserve System*, 473 F.2d 1210, 1214 (2d Cir.), cert. denied, 414 U.S. 827, 94 S.Ct. 48, 38 L.Ed.2d 61 (1973). *Mourning, supra*, 411 U.S. at 377, 93 S.Ct. at 1664, 36 L.Ed.2d 318 announced: "The Truth in Lending Act reflects a transition in Congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose'." *Jones, supra*, at 1040 cited *Mourning, supra*, and stated "TILA's purpose is twofold: to facilitate the consumer's acquisition of the best credit terms available; and to protect the consumer from divergent and at times fraudulent practices stemming from the uninformed use of credit."

Many courts have noted that the TILA's remedial purpose is expressed through Congress' desire "to create a system of private attorney generals to aid its enforcement". *Jones, supra*, at 1040, citing to *Bizier, supra*, and *McGowan v. King, Inc.*, 569 F.2d 845, 849 (5th Cir. 1978). *Bizier* specifically tied the TILA's purpose and philosophy to Congressional intent to grant private claimants enforcement capability:

> . . . Congress sought in the act to vest considerable enforcement power in "private attorney general" individual borrowers who, by suing lenders for alleged violations, could achieve widespread compliance without government intervention.

*Id.* at 2. (Cites omitted.)

Courts uniformly have declared that this remedial act must be liberally construed in favor of the consumer. *King, supra*, at 915; *Riggs v. Government Employees Financial Corp.*, 623 F.2d 68, 70-71 (9th Cir. 1980); *Jones, supra*, at 1040, and *Bizier, supra*, at 3 (" . . . as courts have consistently recognized, the act is intended to balance scales

thought to be weighed in favor of lenders and is thus to be liberally construed in favor of borrowers.") *Jones, supra,* forcefully described judicial commitment to the equitable tolling doctrine to toll the one-year statute of limitations in a TILA claim:

> . . . Only if Congress clearly manifests its intent to limit the federal court's jurisdiction will it be precluded from addressing allegations of fraudulent concealment which by their very nature, and if true, serve to make compliance with the limitations period imposed by Congress an impossibility.
>
> To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

*Jones, supra,* at 1041, citing *Bailey v. Glover, supra.*

Ohio Savings attempts to show that the equitable tolling doctrine is not applicable herein. Ohio Savings claims Borrowers can gain relief through actions unaffected by the Act's one-year statute of limitations, *i.e.,* through pursuing common law claims of fraud, breach of contract, etc. and/or through restitution via administrative enforcement. Petition 10, 11. The argument must fail. Rights under federal statutes cannot be voided merely because a litigant possesses concurrent common law remedies. Moreover, Ohio Savings claims that lenders will never be allowed to benefit from their TILA violations because a borrower may raise the violation at any time in defense of set-off or recoupment to

lender's action to collect the debt. 15 U.S.C. § 1640(e). Petition 9. This argument must fail, also. It unlawfully limits borrowers from pursuing TILA remedies until *after* a lender initiates a collection action.

The evidence has shown that Ohio Savings did benefit from its violation of the TILA. Ohio Savings has admitted that 2,700 existing loans, as distinct from loans retired through home sale, refinancing or foreclosure, suffer from the same amortization problem as loans to Borrowers Hamilton and Seidel. As calculated by Ohio Savings itself, Seidels' balloon payment to retire their mortgage would be $4,702.34. If only 2,700 existing loans were involved, Ohio Savings could realize a windfall of multi-million dollar magnitude. Allowing the equitable tolling doctrine to toll the Act's one-year limitation in this case is the only way to effectuate Congressional purpose. As stated in *Jones, supra,* at 1040: "Congress never intended to facilitate fraudulent practices of lenders by making it difficult for borrowers even to assert their claims."

Ohio Savings argues that the Ohio Supreme Court's opinion would permit equitable tolling where TILA violations exist but intentional concealment is lacking. The bank's argument is intended to demonstrate that the Ohio Supreme Court's opinion is out of step with the analysis of *Jones, supra, Lynch v. Signal Financial Co. of Quincy,* 327 N.E.2d 732, 735 (Mass. 1975), and *Hughes v. Cardinal Fed. Sav. & Loan Ass'n,* 556 F. Supp. 834, 838 (S.D. Ohio, 1983). Petition 18-22. Ohio Savings tries to seek shelter behind the general argument, inapplicable to these facts, that it is unfair to permit suspension of the limitations provision where a lender's inequitable conduct, such as fraud or concealment, is lacking.

These arguments are not persuasive in this case. In this action, Borrowers presented ample evidence that Ohio Savings violated the TILA and used misleading non-TILA documents to obfuscate and hide its TILA violations. Much more than mere TILA violations existed here. Ohio Savings' violations were obscured with gross untruths about the Borrowers' interest rates, payment terms and amortization schedules.

The Supreme Court of Ohio did not endorse a position that would permit equitable tolling of the TILA statute of limitations where evidence of inequitable conduct was lacking. The Ohio court specifically indicated that it was adopting the approach set forth in *Jones, supra.* Under *Jones*, "[f]or application of the doctrine of fraudulent concealment, the one year period will begin to run when the borrower discovers or had reasonable opportunity to discover *the fraud* involving the complained of TILA violation." (Emphasis added.) *Jones, supra,* at 1041. The Ohio Supreme Court's clear adoption of the *Jones* approach refutes the assertion that the court intended to create a novel or unfair approach.

### B. The Ohio Supreme Court Properly Determined the Equitable Tolling Doctrine to Be Applicable to Borrowers' TILA Claims Because Borrowers Raised Factual Issues Regarding Ohio Savings' Fraudulent Concealment of Its TILA Violations or, in the Alternative, Regarding Ohio Savings' Committing TILA Violations in a Manner That They Concealed Themselves.

The Ohio Supreme Court's decision regarding applicability of the equitable tolling doctrine to Borrowers'

TILA claims derived from its own analysis of the TILA's purpose, from reliance on federal law and from the factual issues in this particular case. App. 5, 6. The Ohio court followed the directives of *Jones, supra,* and *King, supra,* in construing the TILA's one-year statute of limitations liberally, in favor of Borrowers, and with deference to the fact that Congress never manifested clear intent to deny the equitable tolling doctrine to private claims arising under the TILA, § 1640(e). *Jones, supra,* at 1041.

As discussed, *supra,* Borrowers presented evidence demonstrating that Ohio Savings' TILA violations involved fraudulent nondisclosures. The Ohio high court specifically adopted *Jones, supra,* at 1041 ("allegations of fraudulent concealment which by their very nature, and if true, [would] serve to make compliance with the limitations period . . . an impossibility") and determined that evidence as to fraudulent concealment of TILA violations would give Borrowers the benefit of the equitable tolling doctrine. App. 6. The Ohio Supreme Court instructed the factfinder to determine when Borrowers reasonably could have discovered the fraudulent and/or concealed nondisclosures and if Borrowers acted within one year from such date.

Borrowers' demonstration of acts of fraudulent concealment, the Ohio Supreme Court's deference to the declared purpose of the TILA, *supra,* § 1601(a), and the Ohio court's clear reliance on *Jones, supra,* for its analysis of the applicability of the equitable tolling doctrine demonstrate that the Ohio court's decision was properly and narrowly tailored to the particular circumstances of the

instant case. *See Burnett, supra,* 380 U.S. at 427, 85 S.Ct. at 1054, 13 L.Ed.2d 941.

## CONCLUSION

The venerable history of the equitable tolling doctrine instructs that, without a clear Congressional mandate to the contrary, the equitable tolling doctrine is read into every statute of limitations. The U.S. Supreme Court has given clear directive to courts considering the doctrine's application in a particular case. Courts are instructed to consider if tolling the statute of limitations will effectuate Congressional intent under the circumstances at issue. Some flexibility is required in the ensuing factual analysis.

After consideration of both the Congressional purpose behind the TILA and federal law authorizing application of the equitable tolling doctrine to toll the Act's one-year statute of limitations for private actions in a proper case, the Ohio Supreme Court properly and unanimously applied this equitable doctrine to Borrowers claims against Petitioner Ohio Savings.

Accordingly, Ohio Savings' Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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## APPENDIX

HAMILTON ET AL., APPELLANTS, *v.* OHIO SAVINGS BANK, F.K.A. OHIO SAVINGS ASSOCIATION, APPELLEE.

[Cite as *Hamilton v. Ohio Savings Bank* (1994), 70 Ohio St.3d 137.]

*Banks – Residential mortgages – Banks method of interest calculation results in incomplete amortization of mortgage within the stated term – Federal Truth in Lending Act violation alleged – Section 1640(e), Title 15, U.S. Code, construed and applied – Statute of limitations tolled until mortgagor discovered or had reasonable opportunity to discover the alleged fraud or nondisclosures that formed the basis for the Truth in Lending action.*

(No. 92-2302 – Submitted April 26, 1994 – Decided August 31, 1994.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 61908.

Plaintiffs-appellants, Frances E. Hamilton, Barbara A. Seidel and George L. Seidel, obtained residential mortgages from defendant-appellee, Ohio Savings Bank, formerly known as Ohio Savings Association ("Ohio Savings"). Hamilton's mortgage was for the principal sum of $44,000 and was to be payable in consecutive monthly installments of $364.79 with the "remaining balance, of principal and interest, if any," payable at the end of the twenty-nine-year mortgage term. The stated interest rate was 9.25 percent. The Seidel mortgage secured a principal amount of $32,400 with monthly payments of $262.76 over a period of twenty-nine years. Its stated interest rate was nine percent per annum. The Hamilton

mortgage was executed in September 1976 and the Seidel mortgage was signed in August 1977.

Both mortgages contained the following language regarding interest calculation:

"Such interest shall be computed monthly by (i) obtaining a daily interest factor based upon a 360-day year, (ii) multiplying such factor by the actual number of days in each calendar month, and (iii) applying the result against the unpaid balance of this note outstanding on the last day of each month."

"Regulation Z" consumer disclosure notices, pursuant to Section 226.1 *et seq.*, Title 12, C.F.R., were provided to both mortgagors. The record contains two different Hamilton Regulation Z forms. One is attached to the appellee's motion for summary judgment and is entitled "Joint Appendix Exhibit 'E' ". On this form a typewritten notation was included that stated "THE CONTRACT INTEREST RATE IS 9.25% (365/360 method)." The second Regulation Z form is attached as plaintiff's Exnibit 4 to the deposition of Judy Ledin. The same typewritten language is included but it would appear that the "365/360" language was altered to read "360/360." Given the state of these documents, it is difficult to ascertain exactly what was done. The Seidel Regulation Z form does not indicate how interest will be calculated.

Ultimately, another Ohio Savings mortgagor, John P. Clark, who holds degrees in both mathematics and economics, discovered that when the 365/360 method of interest calculation is used, the stated interest rate was less than that actually charged and paid to the bank.

Based on this theory, the appellants claim that the actual rate of interest on the Hamilton note became 9.37 percent rather than 9.25 percent, and on the Seidel note, 9.12 percent rather than nine percent. Additionally, because the bank had based the monthly payment on a 365/360 calculation, both notes carried monthly payments that were insufficient to fully amortize the principal over the term of the loan. According to appellants, this will result in outstanding balances at the end of the twenty-nine-year term on both notes, necessitating final payments of $6,493 of the Hamilton note and $4,702.34 on the Seidel note.

Hamilton and the Seidels filed suit on their own behalf and all others similarly situated, claiming violations of the federal Truth in Lending Act, Section 1601 *et seq.*, Title 15, U.S.Code, as well as common-law claims of fraud, unjust enrichment, conversion and breach of contract. After protracted litigation, appellee moved for summary judgment. The bank argued that the 365/360 method of interest calculation was legal and fully disclosed; the understated monthly payment was a mistake by the bank that actually inured to the benefit of appellants by understating their monthly payments by roughly $3 or $4; and the appellants' actions were time-barred. The trial court granted summary judgment for the bank and the court of appeals affirmed, holding, *inter alia*, that appellants' Truth in Lending claims were barred by the one-year statute of limitations found in Section 1640(e), Title 15, U.S.Code.

The matter is now before this court upon the allowance of a motion to certify the record.

---

*Robert E. Sweeney Co., L.P.A. Robert E. Sweeney, Mark Wintering, Kevin E. McDermott* and *J. William Petro; Weiss, Kwait & Associates* and *Steven M. Weiss,* for appellants.

*Arter & Hadden, Hugh M. Stanley, Jr., Irene C. Keyse-Walker* and *Beth Whitmore; Marc W. Freimuth* and *Roy E. Lachman,* for appellee.

*Kristen E. Manos,* urging reversal for *amici curiae,* United States Public Interest Research Group, Ohio Public Interest Research Group, and Consumer Federation of America.

---

MOYER, C.J. The threshold issue is whether appellants' claims are time-barred, thereby divesting the trial court of subject matter jurisdiction. Section 1640(e), Title 15, U.S.Code provides: "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. * * * "

The determinative question is what is meant by "occurrence of the violation." There is a divergence of views among the federal courts regarding the application of that phrase. At least three approaches have been used to determine when the statutory period commences. The first maintains that Congress clearly intended that the statute of limitations begins to run at the execution of the contract and should be strictly enforced. *Stevens v. Rock Springs Natl. Bank* (C.A. 10, 1974), 497 F.2d 307. The second view is based on the notion that nondisclosure of the actual interest rates represents a continuing violation

of the contract and the limitations period should be fluid and liberally applied. *See Postow v. OBA Fed. S. & L. Assn.* (C.A.D.C. 1980), 627 F.2d 1370 (adopting "continuing violation" theory in limited situations). The final theory is that offered by the Sixth Circuit in *Jones v. TransOhio Savings Assn.* (C.A.6, 1984), 747 F.2d 1037. The *Jones* court reasoned that to strictly enforce the one-year statute of limitations would run counter to the expressed purpose of the Act and its remedial nature. Therefore, the court held that under certain circumstances the statute might equitably be tolled. See, also, *King v. California* (C.A.9, 1986), 784 F.2d 910 (expressly adopting the Sixth Circuit's reasoning).

We adopt the third application of the statute because under the appropriate circumstances, tolling the statue [sic] of limitations will effectuate the purpose of Congress in adopting the Truth in Lending Act. Section 1601(a), Title 15, U.S.Code provides: " * * * It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."

The Act was designed as a consumer protection statute aimed at permitting informed choices and guarding against divergent and possibly fraudulent practices. *King, supra,* 784 F.2d at 915. Its provisions are remedial in nature and should be liberally construed. *Jones, supra,* 747 F.2d at 1040. As stated by the Sixth Circuit: " * * * Only if Congress clearly manifests its intent to limit the federal court's jurisdiction will it be precluded from addressing

allegations of fraudulent concealment which by their very nature, and if true, serve to make compliance with the limitations period imposed by Congress an impossibility." *Id.* at 1041.

Therefore, we conclude that in the case before us, the statute of limitations began to run at the time the mortgages were executed. However, the time within which appellants are required to bring an action against the bank may be tolled until they discovered or had reasonable opportunity to discover the alleged fraud or nondisclosures that formed the basis for their Truth in Lending action. This determination necessarily involves questions of fact that preclude summary judgment. On remand, the trial court should determine when the appellants could reasonably have discovered the divergent terms of the mortgage, note and disclosure forms, and whether they filed this action within one year from that date.

As to appellants' common-law claims, we are likewise persuaded that summary judgment was inappropriate. The record is contradictory as to what was disclosed to whom. On one document, the 365/360 method is disclosed; on another it is not. Summary judgment may not be granted when reasonable minds could come to differing conclusions. Civ.R. 56(C). Whether the method of interest calculation and the incomplete amortization of the loan within the stated term were disclosed is a question of fact. Whether these items amounted to misrepresentations fraudulent conduct, or merely harmless mistakes, is also an issue best left to the finder of fact, thereby precluding summary judgment.

For the foregoing reasons, the judgment of the court of appeals is reversed, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

*Judgment reversed*
*and cause remanded.*

A.W. SWEENEY, DOUGLAS, WRIGHT, RESNICK WOLFF and PFEIFER, JJ., concur.

WILLIAM H. WOLFF, JR., J., of the Second Appellate District, sitting for F.E. SWEENEY, J.

*OHIO OFFICIAL REPORTS*

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*Containing Cases Argued and Determined*
*in the*
*Courts of Ohio*

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## NOTICE OF ERRATUM

On page 138 of *Hamilton v. Ohio Savings Bank* (1994), 70 Ohio St.3d 137, "360/360 calculation" should replace "365/360 calculation" in the first paragraph, third sentence.